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A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

James H. Quello, Chairman

Andrew C. Barrett

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Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
November 3, 1993

Released: November 15, 1993

Ms. Barbara J. Stonebraker
Senior Vice President - External Affairs
Cincinnati Bell Telephone
201 E. Fourth Street, 102-300
P.O. Box 2301
Cincinnati, Ohio 45201

Dear Ms. Stonebraker:

This letter is in reference to your letter of September 21, 1993, in which you request permission to withdraw a Cincinnati Bell Telephone (CBT) petition for waiver filed October 14, 1992, AAD 93-90. In the petition CBT requested that we allow it to reclassify certain nonregulated investment formerly used to provide customer dialed account recording (CDAR) to a regulated account. On September 1, 1993, in a conference call with Kenneth Ackerman of my staff, CBT was informed that because of the small amount of investment involved ($7,817 or .06 percent of the investment in the switch), a more appropriate option would be to write-off the investment to nonregulated operations.

In your letter you submit the accounts that CBT proposes to use to remove the CDAR investment from its books of account. According to the letter, you propose to debit Account 6212.900, Digital electronic switching expense-nonregulated and credit Account 3100.2211, Accumulated electronic switching-regulated. This proposal will reduce CBT's net investment by the amount of the CDAR investment and will charge this write-off to nonregulated operations. After reviewing your letter, we find that the regulated ratepayer will not be harmed by your proposed treatment of the CDAR investment. Therefore, we will allow CBT to write-off this investment as proposed, and we dismiss CBT's October 14, 1992, Petition for Waiver.

If you have any questions concerning this letter, please contact Alicia Dunnigan of my staff at (202) 634-1861.

Sincerely,

Kenneth P. Moran
Chief, Accounting and Audits Division

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

HUGHES
COMMUNICATIONS
GALAXY, INC.

and File No. DBS-84-02/81-07/93-03MP

UNITED STATES
SATELLITE BROADCASTING
COMPANY, INC.

For Modification of Construction Permit
For Direct Broadcast Satellite System

MEMORANDUM OPINION AND ORDER

Adopted: November 5, 1993; Released: November 15, 1993

By the Chief, Video Services Division, Mass Media Bureau:

1. Hughes Communications Galaxy, Inc. ("Hughes"), is authorized to construct a Direct Broadcast Satellite ("DBS") system consisting of three satellites. Two of Hughes' satellites are to be located at orbital position 101^0W and are to provide 27 channels of eastern half-CONUS[1] or full-CONUS0[2] DBS service on channels 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 29, and 31.[3] United States Satellite Broadcasting Company, Inc. ("USSB") is authorized to provide five channels of eastern half-CONUS or full-CONUS DBS service on channels 24, 26, 28, 30 and 32 at orbital position 101^0W. To provide this service, USSB has been authorized to purchase and operate five transponders on one of Hughes' satellites to be placed at that position.[4]

2. Hughes and USSB ("the permittees") propose to initiate operation of the two satellites at orbital position 101^0W in the full-CONUS mode. As stated in footnote 2, in *Continental, supra,* the Commission conditionally authorized full-CONUS signals from certain specified orbital positions, including 101^0W, pending final confirmation that such operation will comply with the United States' obligations under international treaties and agreements. Appendix 30 (ORB 85) of the International Telecommunication Union ("ITU") Radio Regulations assigns DBS[5] orbital positions and channels to nations in the western hemisphere and establishes international DBS interference protection standards. The Appendix 30 Plan provides for a 0.4^0 separation between cross-polarized adjacent channels at each orbital position, with even-numbered channels offset 0.2^0 to the east (operating with left-hand circular polarization, "LHCP"), and odd numbered channels offset 0.2^0 to the west (operating with right-hand circular polarization, "RHCP").[6] Thus, under the Plan, LHCP even-numbered channels at 101^0W would actually be located at 100.8^0W and RHCP odd-numbered channels at 101^0W would actually be located at 101.2^0W. Both permittees' authorizations currently specify operation in this mode.

3. Now before the Commission is the above-captioned modification application in which the permittees request that their permits be modified to reverse the orbital position offset of the cross-polarized adjacent channels. Under their modified permits, the LHCP even-numbered channels would be offset 0.2^0 to the west at 101.2^0W, and the RHCP odd-numbered channels would be offset 0.2^0 to the east at 100.8^0W. The permittees also request that their permits be modified to allow operation of their systems with the maximum antenna gain increased by 1.5 dB relative to that currently specified in their permits. The permittees state that these modifications will permit the nationwide use of a uniform size dish antenna (18 inches in diameter); and that this uniformity in receive dish size will significantly improve service in terms of retail distribution and consumer acceptance. In addition, the permittees state that the proposed modifications will have no impact on other aspects of either permittee's operation or on the proposed operations of other DBS permittees; and that the proposed modificaitons would not affect the ability of either permittee to initiate DBS operations by December 4, 1994, as required by Section 100.19(h) of the Commission's Rules, 47 C.F.R. §100.19(b). The permittees submit technical analyses and data to demonstrate that the proposed modifications comply with the limits established in the

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[1] Signals from DBS satellites which cover half of the continental United States are referred to as "half-CONUS" signals; those which cover the entire continental United States are referred to as "full-CONUS" signals.

[2] Four of the DBS orbital positions assigned to the United States under international treaties and agreements, 61.5^0W, 101^0W, 110^0W and 119^0W, may be technically suitable for delivering full-CONUS DBS service. The Commission conditionally authorized full-CONUS signals from these orbital positions pending final confirmation of their compliance with the United States' obligations under international treaties and agreements. *Continental Satellite Corporation,* 4 FCC Rcd 6292, 6294, 6300-01 (1989) (*"Continental"*).

[3] *United States Satellite Broadcasting Company, Inc.,* 7 FCC Rcd 7247 (1992) (*"USSB/Hughes"*). Hughes' third satellite is to be located at orbital position 157^0W and is to provide 27 channels of western half-CONUS DBS service on channels 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24, 26, 28, 30 and 32. *Advanced Communications Corporation,* 6 FCC Rcd 2269, 2270, 2274 (1991). This third Hughes satellite is not affected by the instant modification application.

[4] *USSB/Hughes, supra.* USSB is also authorized to construct and operate (i) a satellite to be located at orbital position 110^0W, to provide three channels of eastern half-CONUS or full-CONUS DBS service on channels 28, 30 and 32; and (ii) a satellite to be located at orbital position 148^0W, to provide eight channels of western half-CONUS DBS service on channels 18, 20, 22, 24, 26, 28, 30 and 32. *United States Satellite Broadcasting Company, Inc.,* 5 FCC Rcd 7576, 7577 (1990). These two USSB satellites are not affected by the instant modification application.

[5] The ITU Radio Regulations refer to the DBS service as "Broadcast Satellite Service", or "BSS".

[6] ITU Radio Regulations, Appendix 30A, Annex 3, ¶ 4.13, AP30A (Orb-88)-243, and Figure 9, AP30A (Orb-88)-245.

applicable international regulations and will have "no appreciable impact" on Region 2 DBS systems, including other domestic systems.

4. This request is a minor modification because the proposed change does not entail the use of any additional orbit/spectrum resources. *Processing Procedures Regarding the Direct Broadcast Satellite Service,* 95 FCC 2d 250, 252 (1983). With regard to the 0.4^0 separation between cross-polarized adjacent channels, Section 4.13.1 of of the ITU Radio Regulations,[7] states that "satellites within a cluster may be located at any orbital position within a cluster, requiring only the agreement of the other administrations having satellites sharing the same cluster." Between them, Hughes and USSB are assigned all of the channels at orbital position 101^0W, and the United States is the only administration with channels at that position. Accordingly, we are permitted to authorize reversal of the orbital position offset of the cross-polarized adjacent channels assigned to the permittees at orbital position 101^0W. Analysis by the Commission's staff of the data submitted by the permittees indicates that the proposal complies with the requirements of international treaties and agreements. Public notice of the instant modification application was issued on August 10, 1993.[8] and no objections have been interposed. We believe that the reason for this modification cited by the permittees, nationwide uniformity of receive dish size and consequent improvement in retail distribution and consumer acceptance, will constitute a significant benefit to the public. Therefore, the instant modification application will be granted.[9]

5. In previous modification applications[10] the permittees proposed to utilize digital signal encoding to accomplish video compression, and asserted that this method of modulation would not cause or receive more interference than the FM video signal parameters used for planning purposes in the applicable international agreements. However, at that time the Commission did not have the capability to analyze the data submitted in support of that aspect of the proposal. Accordingly, those modification applications were granted on the condition that the use of digital modulation as proposed therein would cause no more interference and would require no more interference protection than the FM video signal parameters used for planning purposes in the applicable international agreements.[11] We have now been able to determine that the use of digital emission, as proposed, will not cause greater interference than that caused by the system considered in the Plan. Therefore, the authorization granted in this Order specifies the use of a digital signal.

6. Accordingly, IT IS ORDERED, That the Application for Minor Modification of Construction Permit filed by Hughes Communications Galaxy, Inc., and United States Satellite Broadcasting Company, Inc., (DBS-84-04/81-07/93-03MP) IS GRANTED, SUBJECT TO THE CONDITIONS that (i) the ITU confirms that such proposed operation complies with the parameters established by RARC-83;[12] and (ii) the permittees continue to proceed with due diligence in the construction of their proposed DBS systems.

7. The grant of this application includes launch authority. A modified conditional construction permit and launch authority documents are being sent to the permittees under separate cover.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Services Division
Mass Media Bureau

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[7] ITU Radio Regulations, Appendix 30A, Annex 3, ¶ 4.13.1, AP30A (Orb-88)-243.

[8] Report No. DBS/PN 93-04, Mimeo No. 34353.

[9] Pursuant to Appendix 30, the ITU must be provided with technical information regarding the permittees' proposed operation, and that body must confirm that such proposed operation has complied with the parameters established by RARC-83, as amended.

[10] File Nos. DBS-91-01MP/MINOR EXT. and DBS-91-02MP/MINOR.

[11] *USSB/Hughes,* 7 FCC Rcd at 7249, 7251.

[12] *See* footnote 9.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-24

In the Matter of

Local Exchange Carrier Line
Information Database

ORDER

Adopted: November 4, 1993; Released: November 15, 1993

By the Acting Chief, Common Carrier Bureau:

1. On August 23, 1993, the Commission released its decision in the LIDB investigation.[1] Pursuant to that Order eight of the carriers subject to that investigation were asked to file refund plans. The Commission delegated to the Bureau the authority to review and approve the refund plans.[2] On September 22, 1993, and September 23, 1993, the affected carriers, Ameritech Operating Companies (Ameritech), Bell Atlantic Telephone Companies (Bell Atlantic), BellSouth Telephone Companies (BellSouth), GTE Telephone Operating Companies (GTE), NYNEX Telephone Companies (NYNEX), Pacific Bell Telephone Companies (Pacific Bell), United Telephone System (United), and US West, Inc. (US West) filed refund plans. Generally, these companies propose to issue refunds either by presenting customers with a check for the amount owed, or by issuing a one-time credit on the customer's bill. With the exception of Bell Atlantic, the companies will compute refunds, with interest, to cover the period from January 1, 1992, to the date they lowered their rates, as described in the *LIDB Final Order*.

2. On October 19, 1993, AT&T filed a letter objecting to the refund plan filed by Bell Atlantic. AT&T asserts that Bell Atlantic's refund plan is contrary to the Commission's Order. Specifically, AT&T contends that Bell Atlantic states that no refund is required for the rates charged after July 1, 1993, which, AT&T argues, is in violation of the Commission's Order.[3]

3. Bell Atlantic contends that the *LIDB Final Order* required Bell Atlantic to adjust the price cap indices as of July 1, 1993, to reflect the revised LIDB rates.[4] Bell Atlantic asserts that under the price cap rules, it had the ability, as of July 1, 1993, to set its LIDB rates to the originally filed levels without violating the price cap or the upper limit on the Service Band Index.[5] Therefore, it argues that no refund is appropriate for the period during which it could freely change rates. Thus, Bell Atlantic proposes to issue refunds from January 1, 1992, to July 1, 1993.[6]

4. After reviewing the refund plans, we find that only Bell Atlantic's refund plan does not comply with the requirements of the *LIDB Final Order*. In that Order, the Commission required those carriers issuing refunds to calculate the refunds for the period between the date their original tariffs became effective and the date that the rate identified in the *LIDB Final Order* became effective.[7] Bell Atlantic is correct as a theoretical matter that it would have had flexibility to set its LIDB rates at their originally filed levels. However, the *LIDB Final Order* explicitly requires companies to refund for the period through September 4, 1993, overriding this theoretical pricing flexibility. All seven of the other affected carriers have complied with the Order. Bell Atlantic must follow the *LIDB Final Order* and award refunds from January 1, 1992, until September 4, 1993, the date of Bell Atlantic's revision to its LIDB rates.

5. Accordingly, IT IS ORDERED that the refund plans of Ameritech Operating Companies, BellSouth Telephone Companies, GTE Telephone Operating Companies, NYNEX Telephone Companies, Pacific Bell Telephone Companies, United Telephone System, and US West, Inc. ARE APPROVED.

6. IT IS FURTHER ORDERED that the Bell Atlantic Telephone Companies SHALL ISSUE REFUNDS to affected customers for the period January 1, 1992 to September 4, 1993.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief, Common Carrier Bureau

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[1] Local Exchange Carrier Line Information Database, CC Docket No. 92-24, FCC 93-400, 8 FCC Rcd 7130 (1993) (*LIDB Final Order*).

[2] *LIDB Final Order*, 8 FCC Rcd 7130, at ¶57.

[3] *See* Letter from T.W. Ramsey, Government Affairs, Division Manager, AT&T, to Mr. G. Vogt (filed October 19, 1993).

[4] *See* Bell Atlantic Refund Plan, CC Docket No. 92-24, (filed September 22, 1993), at 2-3.

[5] *Id.*

[6] *Id.*

[7] *LIDB Final Order*, 8 FCC Rcd 7130, at ¶57. For Bell Atlantic, as for all companies, this effective date was September 4, 1993.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Atlantic Telco, Inc. and
Tel & Tel Payphones, Inc.

Request for
Declaratory Ruling

ORDER

Adopted: November 4, 1993; Released: November 15, 1993

By the Acting Chief, Common Carrier Bureau:

I. INTRODUCTION

1. Atlantic Telco, Inc. (Atlantic Telco) and Tel & Tel Payphones, Inc. (Tel & Tel) request that the Commission issue a declaratory ruling that an independent pay telephone provider will not be held responsible for fraudulent long distance calls placed through its independent pay telephones or over lines associated with its pay telephones and carried by American Telephone and Telegraph Company (AT&T). While we decline to make such a ruling with respect to all instances of pay telephone fraud involving independent payphone providers, we do in this Order consider petitioners' individual claims.

II. BACKGROUND AND PLEADINGS

2. Atlantic Telco and Tel & Tel are independent pay telephone providers unaffiliated with the Bell Operating Companies (BOCs), AT&T or any other provider of local or long distance telephone service. As a result of fraudulent international calls that AT&T contends originated from petitioners' pay telephones, AT&T filed suit in United States District Court for the District of Maryland for reimbursement of approximately $2 million from Atlantic Telco and $200,000 from Tel & Tel. By two Orders dated March 31, 1992, the court directed petitioners to file a request for declaratory ruling with the Commission to determine whether either petitioner is a "customer" for purposes of AT&T Tariff No. 1.[1]

3. AT&T Tariff No. 1 holds customers responsible for the payment of Long Distance Message Telecommunications Service (LDMTS) bills.[2] The tariff defines a customer as "the person or legal entity which orders LDMTS (either directly or through an agent) and is responsible for payment of tariffed charges for services furnished to that customer."[3] Atlantic Telco and Tel & Tel argue that they are not customers for purposes of the tariff because they neither ordered nor were furnished service. As a result, they assert that they are not liable for the fraudulent calls in question.[4] Atlantic Telco and Tel & Tel also contend that AT&T's tariff is ambiguous and therefore should be interpreted against AT&T,[5] and they submit that fraud is not included among the responsibilities of the customer set out in the tariff.[6] They note that the only section of the tariff that addresses fraud does not list liability for fraud as the customer's responsibility.[7] Atlantic Telco and Tel & Tel additionally note that they did not select AT&T as their primary interexchange carrier (IXC), *i.e.*, neither petitioner presubscribed its payphones to AT&T.[8] Further, petitioners argue that AT&T, as the owner and operator of the long distance network, has the ability to prevent fraud through network-based solutions.[9] Atlantic Telco and Tel & Tel also contend that the fact that AT&T absolves local exchange carrier payphones from liability for fraud is proof that the tariff must be interpreted in a similar manner with respect to independent payphone providers.[10]

4. Conversely, AT&T contends that petitioners ordered service from AT&T by connecting their telephones to the public switched network so that calls from petitioners' phones could be sent to AT&T and so that collect or third-party billed AT&T calls could be accepted at their phones.[11] Further, AT&T argues, while petitioners assert that a specific request for service made with authorization is the only way one can "order" service and be a "customer," the tariff delineates four types of LDMTS calls for which customers are responsible: (1) calls that originated at the customer's number; (2) calls that were accepted at the customer's number (*i.e.*, collect calls); (3) calls that were billed to the customer's number via Third Number Billing; or (4) calls that were incurred at the specific request of the customer.[12] AT&T contends that petitioners' interpretation of "customer" as the entity that specifically orders service is overly restrictive in that it would render provisions (1), (2) and (3) surplusage in the tariff.[13] In addition, AT&T contends that it does not have the capacity to recognize and

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[1] American Telephone and Telegraph Company v. Atlantic Telco, Inc., Civil No. L-90-2873, Mar. 31, 1992; American Telephone and Telegraph Company v. Tel & Tel Pay Phones, Inc., Civil No. L-91-343, Mar. 31, 1992. Atlantic Telco and Tel & Tel originally filed their "Joint Motion for Declaratory Ruling" on May 14, 1992. On June 12, 1992, the Chief, Tariff Division, Common Carrier Bureau sent letters to counsel for petitioners and for AT&T advising them that the sole issue referred by the court involved the definition of "customer" in AT&T Tariff F.C.C. No. 1. On June 29, 1992, petitioners' counsel submitted a letter requesting, among other things, that the joint motion be placed on public notice. On July 16, 1992, AT&T filed its comments on the joint motion, and Atlantic Telco and Tel & Tel filed a "Revised Joint Motion for Declaratory Ruling." That pleading is substantially similar to the original joint motion, but purports to strike issues beyond the definition of "customer" under the tariff. AT&T filed reply comments on August 14, 1992, arguing that some issues raised in the revised joint motion were beyond the scope of this proceeding. Also on August 14, Atlantic Telco and Tel & Tel filed their joint reply comments.

[2] AT&T Tariff No. 1, Section 2.4.1.A.

[3] *Id.* at Section 2.10.

[4] Atlantic Telco and Tel & Tel Revised Joint Motion for Declaratory Ruling at 14-26.

[5] *Id.* at 6-7, 12-13.

[6] *Id.* at 28-33.

[7] *Id.* at 36-40.

[8] *Id.* at 27.

[9] *Id.* at 36, Exhibit 3.

[10] *Id.* at 40-41.

[11] AT&T Comments at 4-5.

[12] *See* AT&T Tariff No. 1, Section 2.4.1.A.

[13] *Id.* at 5-7.

block international calls from pay telephones.[14] AT&T then argues that the fact that petitioners were not presubscribed to AT&T does not mean that they are not responsible for the charges in question,[15] and notes that petitioners have paid all domestic charges regardless of possible fraud.[16] Finally, AT&T submits that *Chartways Technologies, Inc. v. AT&T Communications*, 6 FCC Rcd 2952 (Com. Car. Bur. 1991), rejected the argument that AT&T Tariff Nos. 1 and 2 were unreasonably vague and concluded that subscribers are liable for unauthorized calls that originate at their numbers.[17]

III. DISCUSSION

5. The Commission recently resolved a case similar to the dispute between petitioners and AT&T. In *United Artists Payphone Corporation v. New York Telephone Company and American Telephone and Telegraph Company*, 8 FCC Rcd 5563 (1993) (*United Artists*), the Commission determined that independent payphone provider United Artists was not AT&T's customer under AT&T Tariff No. 1 and was therefore not responsible for certain fraudulent calls. The Commission so concluded because United Artists did not presubscribe its payphones to AT&T for direct-dialed service and because United Artists took affirmative steps to control unauthorized direct-dialed and operator-assisted calls. Specifically, the Commission noted that United Artists ordered originating line and billed number screening services intended to inform operator service providers of any billing restrictions on its lines, and ordered a service intended to block certain 10XXX dialing sequences.[18] United Artists also programmed its payphones to block operator-assisted and direct-dialed calling outside of the local area. Finally, United Artists monitored calling from its payphones and regularly reported any apparently fraudulent calling to New York Telephone and AT&T. The Commission noted, however, that

> If UA had failed to take steps to control unauthorized operator-assisted and direct-dialed calling and had, instead, installed its phones in such a way as to allow callers to charge such calls to UA payphone lines, UA could reasonably be held to have constructively "ordered" service from AT&T, thus establishing an inadvertent carrier-customer relationship.[19]

6. Thus, a party challenging unauthorized long distance charges will not be considered a "customer" under AT&T's tariff if it took reasonable steps to block the calls in question and if it did not presubscribe to AT&T. For the same reasons stated in *United Artists*, we conclude that Atlantic Telco and Tel & Tel were not "customers" within the meaning of the tariff. Atlantic and Tel & Tel did not presubscribe their payphones to AT&T.[20] Moreover, Atlantic and Tel & Tel took a number of steps to prevent unauthorized international calls from their payphones. In particular, petitioners submit that all of their payphones were programmed to block direct-dialed 011+ and 10XXX-011+ calls.[21] Further, petitioners assert that they do not accept collect calls or third-party billed calls at their payphones.[22] Finally, petitioners contend that they have taken steps to prevent "clip-on fraud," a common method of pay telephone fraud. Clip-on fraud involves the use of alligator clips or similar devices to penetrate the local loop between the pay telephone and the local exchange carrier (LEC) central office, enabling the defrauder to bypass the payphone's blocking mechanisms. Specifically, petitioners note that they have installed heavy duty shielded payphones, have shielded the cable from the payphones to the demarcation point with the telephone company and have sought to locate their payphones as close as possible to that demarcation point.[23] We note that AT&T has not challenged petitioners assertions regarding the measures they took to prevent unauthorized international calls. We presume here that petitioners indeed took such measures, although the court may find otherwise based on the record before it.[24]

7. We do not agree with AT&T that *Chartways* is applicable to this case. In affirming *Chartways*, the Commission held a customer who had subscribed to AT&T LDMTS and 800 service liable for unauthorized calls made through its private branch exchange (PBX). Unlike *United Artists*, *Chartways* did not involve the issue of whether Chartways was a "customer" under AT&T's tariff. Rather, *Chartways* turned on, *inter alia*, the Commission's rejection of the argument that AT&T Tariff Nos. 1 and 2 are unreasonably vague because they do not specify that the customer is responsible for fraud, and the Commission's finding that the customer was able to control access to its PBX. Indeed, *Chartways* is consistent with *United Artists* in that the Commission held Chartways responsible for the disputed charges upon finding that Chartways, who did in fact order service from AT&T, did not take sufficient measures to restrict remote access to its PBX.

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[14] *Id.* at 11.

[15] *Id.* at 12-13.

[16] *Id.* at 9 n.15, 10. Atlantic Telco and Tel & Tel respond that they did not challenge their domestic charges because no means exists to distinguish between legitimate and fraudulent domestic calls. Atlantic Telco and Tel & Tel Joint Reply Comments at 3.

[17] *Id.* at 7-8. The Common Carrier Bureau decision cited by AT&T was later affirmed by the Commission. Chartways Technologies, Inc. v. AT&T Communications, 8 FCC Rcd 5601 (1993).

[18] We note that the complaint in *United Artists* was filed prior to adoption of the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA). In implementing TOCSIA, the Commission required pay telephone providers to unblock 10XXX calls, although such providers were permitted to subscribe to blocking and screening services offered by LECs that would prevent 10XXX calls from being billed to the originating telephone. *See* Report and Order and Further Notice of Proposed Rule Making in CC Docket No. 91-35, 6 FCC Rcd 4736, 4738, 4740-41 (1991).

[19] 8 FCC Rcd at 5566.

[20] Tel & Tel presubscribed its phones to National Telephone Services, Inc. *See* Memorandum, American Telephone and Telegraph Company v. Tel & Tel Payphones, Inc., Civil No. L-91-343, Mar. 31, 1992, at 2-3. It is unclear which carrier was selected by Atlantic Telco as its primary IXC, although it is clear that Atlantic Telco did not select AT&T. *See* Atlantic Telco and Tel & Tel Revised Joint Motion at 27, 31.

[21] Atlantic Telco and Tel & Tel Revised Joint Motion at 19.

[22] *Id.* at 32-33.

[23] *Id.* at 11, 24.

[24] While this case involves a petition for declaratory ruling rather than a complaint, we remind parties that in a Section 208 complaint proceeding, the complainant bears the burden of proof on the issues of liability and damages.

8. While we conclude that petitioners are not customers for purposes of AT&T's tariff, we decline to grant petitioners' request that their joint motion for declaratory ruling be placed on public notice and that a general definition of customer under AT&T's tariff be formulated. The Orders issued by the court in this case directed each petitioner to file "an application with the Federal Communications Commission seeking a declaratory ruling as to whether it is a customer' within the meaning of AT&T F.C.C. Tariff No. 1.[25] The Orders did not require us to look beyond the status of Atlantic Telco and Tel & Tel. Moreover, *United Artists* indicated that the Commission would engage in a case-by-case analysis of the steps taken by a particular provider to prevent fraudulent calls, so a more sweeping ruling would be inappropriate. Therefore, on this record, we are unable to issue a declaratory ruling that is broader than that contained in this Order.[26]

IV. ORDERING CLAUSE

9. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 203(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 203(c), the revised joint motion for declaratory ruling filed by Atlantic Telco, Inc. and Tel & Tel Payphones, Inc. IS GRANTED to the extent indicated herein and otherwise IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief
Common Carrier Bureau

[25] American Telephone and Telegraph Company v. Atlantic Telco, Inc., Civil No. L-90-2873, Mar. 31, 1992, at 2; American Telephone and Telegraph Company v. Tel & Tel Pay Phones, Inc., Civil No. L-91-343, Mar. 31, 1992, at 1.

[26] Because we find that petitioners were not customers for purposes of Tariff 1, we need not address the other issues regarding unauthorized use raised by the parties.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-83

In re Applications of

RICHARD M. CARRUS	File No. BPH-891018MD
HORTON BROADCASTING COMPANY, INC.	File No. BPH-891018MI
EVETT COMMUNICATIONS, INC.	File No. BPH-891018MN
Frank J. Banks d/b/a BANKS INVESTMENT COMPANY	File No. BPH-891018MQ

For Construction Permit for a
New FM Station on Channel 267A
at Port St. Lucie, Florida

MEMORANDUM OPINION AND ORDER

Adopted: November 3, 1993; Released: November 18, 1993

By the Review Board: MARINO (Chairman) and BLUMENTHAL. Board Member GREENE absent.

1. Before the Review Board is the *Initial Decision*, 8 FCC Rcd 608 (1993) (*I.D.*) of Administrative Law Judge Joseph Chachkin (ALJ) in the above-captioned proceeding for authority to construct a new FM broadcast station at Port St. Lucie, Florida. Richard M. Carrus, Evett Communications, Inc. (Evett), and Frank J. Banks d/b/a Banks Investment Company (Banks) have each filed exceptions to the *I.D.* challenging the ALJ's grant of the application of Horton Broadcasting Company, Inc. (Horton).

2. In the subject *I.D.*, the ALJ (1) disqualified Banks on a financial issue; (2) wholly rejected Evett's claim of 100% integration credit and assessed a diversification demerit against it to reflect the media interests of its former non-voting stockholders; and (3) credited the integration proposals of Horton for full-time credit and Carrus for part-time credit (25 hours per week). He concluded that grant of Horton's proposal would best serve the public interest as defined by the Commission's *Policy Statement on Comparative Broadcast Hearings* (*Policy Statement*), 1 FCC 2d 393 (1965).

3. Based on our initial examination of the *I.D.* and the record in light of the exceptions, the Board approves the ALJ's disqualification of Banks, his resolution of Evett's comparative proposal, and his underlying determination of Horton's basic qualifications. However, the Board departs from the *I.D.*'s analysis on the crediting of the integration proposals of Horton and Carrus and, for reasons to be fully discussed in our ultimate Decision in this proceeding, we find that neither applicant is entitled to integration credit. *See, e.g., Gloria Bell Byrd*, 8 FCC Rcd 7124 (1993) (principal's retention of business and lack of unequivocal resignation pledge therefrom necessitated denial of integration credit); *Julia S. Zozaya*, 5 FCC Rcd 6607 (1990) (simultaneous integration at two stations deemed unlikely of effectuation), *recon. denied*, 6 FCC Rcd 4416 (1991), *remanded on other grounds sub nom. Flagstaff Broadcasting Foundation v. FCC*, 979 F.2d 1566 (D.C. Cir. 1992).

4. In light of the above preliminary conclusions, we will request that the parties file supplemental briefs on the remaining question for our consideration: which applicant would be preferred under *current law, i.e.*, the 1965 *Policy Statement*, in the absence of the award of integration credit to any of the competing applicants? *Emision De Radio Balmaseda, Inc.*, 7 FCC Rcd 2363 (Rev. Bd. 1992); *see generally Deep South Radio, Inc.*, 46 RR 2d 1657 (1980) (slight credit awarded despite applicant's failure to describe with sufficient specificity the managerial duties of proposed integrated principal); *Policy Statement*, 1 FCC 2d at 396 ("slight credit will be given for the local residence of those persons with ownership interests who cannot be considered as actively participating in station affairs on a substantially full-time basis but who will devote some time to station affairs").

5. ACCORDINGLY, IT IS ORDERED, That the parties ARE DIRECTED TO FILE supplemental briefs on the question described in paragraph 4, *supra*, within twenty (20) days of the release date of this Order; and that reply briefs SHALL BE FILED no later that ten (10) days after the filing of the supplemental briefs.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NYNEX Telephone Companies Transmittal No. 206
Tariff F.C.C. No. 1

Access Management Ordering Option

ORDER

Adopted: November 4, 1993; Released: November 8, 1993

By the Acting Chief, Common Carrier Bureau:

1. On June 29, 1993, the NYNEX Telephone Companies (NYNEX) filed Transmittal No. 206, which proposes to introduce an Access Management Ordering Option for special access customers that have at least one circuit with a bit rate of 44.736 Mbps or greater. Through Access Management, NYNEX proposes to provide network design advice, including recommending the least cost configuration for all of the customer's special access services within a LATA. Transmittal 206 has not been protested.

2. NYNEX proposes that if a customer rearranges its service pursuant to NYNEX's recommendations within six months of receiving those recommendations, NYNEX will not assess the customer any non-recurring charges, provided that the underlying special access service is provided or will be provided under a Service Discount Plan of three years or longer. The tariff proposal further states that if NYNEX later discovers that it recommended a more costly design than other available alternatives, it will issue a credit to the customer. The proposed credit amount would be the difference between the price of the actual service received by the customer and the price the customer would have paid had NYNEX recommended the less expensive service, for up to a maximum of three months.

3. By providing the type of retroactive credit described above, NYNEX would charge the customer for the service NYNEX could have provided rather than for the service it did in fact provide. As such, the tariff proposal violates the Communications Act. Section 203(a) of the Act dictates that carriers must file schedules of charges for communications services; Section 203(c)(1) states that no carrier shall "charge, demand, collect or receive a greater or less or different compensation, for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect . . ." 47 U.S.C. §§ 203(a), 203(c)(1). Transmittal 206 proposes to charge the customer "different compensation" for the service received by the customer than that specified in NYNEX's tariff and must therefore be rejected.

4. Accordingly, IT IS ORDERED that pursuant to Section 203(c)(1) of the Communications Act of 1934, as amended, 47 U.S.C. § 203(c)(1), the tariff revisions filed by the NYNEX Telephone Companies in Tariff F.C.C. No. 1, Transmittal No. 206, ARE REJECTED.

5. IT IS FURTHER ORDERED that the NYNEX Telephone Companies SHALL FILE within ten days from the release date of this Order tariff revisions, to become effective on one day's notice, in order to remove the rejected material from its tariff. NYNEX should cite the DA number of this Order as the authority for this filing.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LITEL TELECOMMUNICATIONS CORPORATION
d/b/a LCI INTERNATIONAL,
Complainant,

v.

CENTRAL TELEPHONE COMPANY OF OHIO,
Defendant.

File No. E-92-130

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Enforcement Division
Common Carrier Bureau

ORDER

Adopted: November 8, 1993; Released: November 15, 1993

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On September 30, 1992, LiTel Telecommunications Corporation d/b/a LCI International (LiTel) filed the above-captioned complaint against Central Telephone Company of Ohio (Centel)[1] seeking damages resulting from Centel's alleged violations of the Commission's rate of return prescription for the period January 1, 1989 through December 31, 1990. On October 25, 1993, LiTel and Century filed a joint motion to dismiss the complaint with prejudice stating that a mutually agreeable settlement of all pending controversies has been reached.

2. We are satisfied that granting the parties' motion to dismiss the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of the Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the parties' Joint Motion to Dismiss IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

[1] Century Telephone of Ohio, Inc. (Century) is the successor in interest to Centel.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LITEL
TELECOMMUNICATIONS
CORPORATION
d/b/a LCI INTERNATIONAL,
Complainant,

v.

PACIFIC BELL, File No. E-92-123
Defendant.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Enforcement Division
Common Carrier Bureau

ORDER

Adopted: November 8, 1993; Released: November 15, 1993

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On September 30, 1992, LiTel Telecommunications Corporation d/b/a LCI International (LiTel) filed the above-captioned complaint against Pacific Bell seeking damages resulting from Pacific Bell's alleged violations of the Commission's rate of return prescription for the period January 1, 1989 through December 31, 1990. On October 12, 1993, LiTel and Pacific Bell filed a joint motion to dismiss the complaint without prejudice[1] stating that a mutually agreeable settlement of all pending controversies has been reached.

2. We are satisfied that granting the parties' motion to dismiss the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of the Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the parties' Joint Motion to Dismiss IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

[1] Per phone conversations on October 22, 1993, and November 3, 1993, the parties withdrew their request to have the complaint dismissed without prejudice.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NEW VALLEY CORPORATION,
Complainant,

v. File No. E-87-50S

PACIFIC BELL,
Defendant.

MEMORANDUM OPINION AND ORDER

Adopted: November 1, 1993; Released: November 15, 1993

By the Acting Chief, Common Carrier Bureau:

I. INTRODUCTION

1. We have before us the Second Supplemental Complaint for damages filed by New Valley Corporation (formerly known as Western Union Corporation) against Pacific Bell (PacBell) on October 4, 1990. New Valley seeks an award of damages from PacBell for violations of Sections 201(b) and 203(c) of the Communications Act, 47 U.S.C. §§ 201(b) and 203(c), as determined by the Commission in a Memorandum Opinion and Order released August 6, 1990.[1] For the reasons below, we deny New Valley's supplemental complaint.

II. BACKGROUND

2. New Valley filed complaints and supplemental complaints for damages against a number of Bell Operating Companies (BOCs) alleging that the defendants had unlawfully billed New Valley for certain intrabuilding connecting circuits pursuant to their special access tariffs because the terms of the tariffs did not specifically cover such circuits. The defendants, including PacBell, denied the allegations and moved to dismiss the complaints. The Commission granted the complaints in part, finding that although the carriers may have intended the channel termination rate charge specified in the tariffs to apply to intrabuilding circuits, the plain meaning of the channel termination rate charge, as defined in the tariffs, did not encompass intrabuilding connecting circuits.[2] The Commission found the record inadequate, however, to rule on the question of damages and directed New Valley to file a second set of supplemental complaints if it wished to pursue its damages claims. In so doing, the Commission emphasized that New Valley would bear the burden of proving that it had actually been damaged and in what amounts. The Commission cautioned New Valley that its analysis in its original complaint and its initial supplemental damages complaint regarding the appropriate special access ratemaking methodologies was seriously flawed. Further, in order to establish that the charges at issue were unreasonable, New Valley was directed to address the apparent conflict between its ratemaking theories and the contrary holdings of the Commission.[3] New Valley subsequently filed new supplemental damages complaints against each of the defendants. All but the instant complaint have been settled by the parties.[4]

III. CONTENTION OF THE PARTIES

3. New Valley's primary claim for damages is that it is entitled to the return of all monies paid to PacBell because there was no legal tariff covering the service it received. It bases this argument on the so-called "filed-rate" doctrine. New Valley contends, citing *Maislin Industries, Inc. v. Primary Steel, Inc.*, 497 U.S. 161 (1990), that there is no more settled doctrine of public utility and common carrier law than that a carrier must charge consistently with its lawfully filed tariff and the rate must be strictly adhered to irrespective of any inequities, harshness, or windfall that may result.[5] Therefore, New Valley argues, since PacBell did not have a lawful tariff on file covering intrabuilding circuits, PacBell could not bill New Valley the tariff rate for these circuits and New Valley is entitled to a refund of all such charges paid to PacBell, plus interest.

4. As an alternative claim, New Valley contends that another measure of its damages would be a refund of all charges paid to PacBell for the circuits less the reasonable cost to PacBell of providing the stand-alone intrabuilding circuits to New Valley.[6] New Valley contends that because intrabuilding circuits are not functionally similar to the channel termination services provided under the tariff and are a fraction of the services contemplated under the two channel termination tariff provision,[7] the application of the tariff charges to the intrabuilding circuits at issue is unreasonable and "would egregiously over-compensate PacBell." In addition, New Valley claims that cost comparisons are not appropriate because the function of two channel termination services is to provide intracity communications links between premises in two separate locations while intrabuilding circuits are stand-alone services.[8] Finally, New Valley contends that, even if the intrabuilding facilities are considered functionally similar to channel terminations, any such similarity occurs on a

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[1] Western Union Corp. v. Southern Bell, 5 FCC Rcd 4853 (1990) (*Liability Order*).

[2] *Liability Order*, 5 FCC Rcd at 4855. Additionally the Commission observed that the intrabuilding circuits were ones that would properly be provided within the special access tariffs of which the channel termination rate category is a part.

[3] *Id.* Contrary to New Valley's claims, the Commission has repeatedly rejected contentions that rates, in order to be reasonable, must be based on physical routing characteristics or on the costs of actual facilities used to provide service to a particular customer. *See, e.g., Investigation of Special Access Phase I Tariffs of Local Exchange Carriers*, FCC 86-52 (released Jan. 24, 1986), *aff'd* 1 FCC Rcd 427 (1987), *remanded on other grounds sub nom. Western Union Corp* v. *FCC*, 856 F.2d 315 (D.C. Cir. 1988) (*Special Access Order*).

[4] *See* Western Union Corp. v. Southern Bell, 6 FCC Rcd 6992 (Com. Car. Bur. 1991).

[5] Opposition To PacBell Motion To Dismiss at 6.

[6] *Id.* at 10.

[7] *Id* at 11.

[8] *Id.*

one-to-one basis and New Valley would, at a minimum, be entitled to a refund based on a single channel termination charge.[9]

5. In its reply, PacBell argues that New Valley's second supplemental complaint does not support a claim for damages.[10] It contends that New Valley has met neither the general burden imposed by the Commission nor the Commission's directive in the *Liability Order* to address flaws in its theories regarding appropriate ratemaking methodologies. It states that New Valley is merely restating the same arguments which the Commission has already rejected.[11] It further contends that the filed-rate doctrine cannot be used, nor has it ever been accepted by a court, to allow a customer to avoid paying for a service provided by a carrier.[12] It argues that in *Maislin*, the court noted that cases involving the filed-rate doctrine have not required departure from the filed schedule completely. Instead, PacBell contends, these cases have voided rates different from those contained in the filed tariff. PacBell argues that the classic case involves the successful negotiation of a rate lower than the tariffed rate between a carrier and customer, which the court then voids since it was a departure from the filed rate. PacBell concludes that the doctrine cannot be used to avoid paying for a service already rendered.[13]

6. PacBell further contends that New Valley is still seeking alternatives to the current "averaged cost" special access rate structure that were previously rejected by the Commission in 1984 when it ordered the current structure to be implemented.[14] According to PacBell, New Valley's claim centers primarily on its unsupported contention that a typical intrabuilding circuit should cost less than a typical special access circuit because less equipment and facilities are involved in routing a call over the circuit.[15] PacBell argues that the Commission specifically found that "physical routing ... does not affect the definition of a unit of service, rather, it is reflected in the average or marginal cost of providing a unit of service."[16] PacBell maintains that the Commission specifically concluded that, with minor exceptions not relevant here, private line services are to be priced on a straight-line basis between two points regardless of physical routing.[17] PacBell points out that despite New Valley's claims to the contrary in the *Special Access Order* proceeding, the Commission held that it was proper for the costs of certain equipment to be bundled into the channel termination rate, even though it forced customers like New Valley to pay for equipment that it did not use.[18]

7. PacBell next contends that New Valley has submitted no evidence to support its claim that intra-building circuits are not like the two channel termination services to which its special access tariffs apply. PacBell maintains that because the function provided to New Valley by the intrabuilding circuits is a communications path between two designated points, a channel termination charge for each point is properly levied under the tariffs and New Valley must pay for what it received.[19]

IV. DISCUSSION

8. After careful review of the arguments and evidence presented by the parties, we find that New Valley has failed to satisfy its burden of establishing that it is entitled to an award of damages from PacBell.[20] New Valley relies on the court's decision in *Maislin* to support its principal claim that it is entitled to a refund of all charges paid for the circuits at issue because PacBell's tariff did not authorize PacBell to charge and collect for the circuits. We find no basis in *Maislin* or any other court or Commission decision for the conclusion that a customer may be exempt from paying for services provided by a carrier if those services were not properly encompassed by the carrier's tariff. In any event, the Commission effectively rejected this argument in the *Liability Order* when it directed New Valley to submit new supplemental damages complaints in which it would bear "the burden of proving that it actually has been damaged."[21] Had New Valley been correct in its assertion, the Commission would simply have directed PacBell to make the refund requested in the *Liability Order*.

9. New Valley's alternate theory of recovery is also flawed for reasons stated in the *Liability Order*. There the Commission noted that it had repeatedly rejected the proposition that the reasonableness of a rate or charge must be based on physical routing characteristics or on the costs of the actual facilities used to provide service to a particular customer.[22] Rather, the Commission made clear that New Valley would either have to present evidence showing that the rates it paid for the service at issue were unreasonable in relation to the average cost of providing the service or have to explain the basis for the conflict between relevant Commission decisions and its claim that the reasonableness of the defendants' charges for intrabuilding circuits should be based on the particular physical routing or network configuration involved.[23] New Valley has failed to make this showing. Much of its submission is devoted to rearguing the claims rejected by the Commission. It provides no evidence or persuasive arguments to support its one additional claim that intrabuilding circuits are functionally dissimilar to channel termination services and cannot be charged the same rate or similar rates. Thus, we find no persuasive support in the record for its damages claims.

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[9] *Id.*

[10] PacBell's Reply to New Valley's Opposition To Motion To Dismiss at 6.

[11] *Id.* at 6.

[12] *Id* at 7.

[13] *Id.*

[14] *Id.* at 3, citing *Special Access Order*, 1 FCC Rcd at 427.

[15] *Id.* at 2.

[16] *Id.* at 3, citing Investigation of Access and Divestiture Related-Tariffs, 97 FCC 2d 1082, 1252-58 (1984).

[17] *Id.* at 3.

[18] *Id.*

[19] *Id.* at 5.

[20] It is well established that a complainant in a Section 208 complaint proceeding has the burden of establishing both a violation of the Act, or Commission rule or orders and actual damages suffered in consequence of such violations. *See, e.g.*, Section 208 Complaints Alleging Violations of the Commission's Rate of Return Prescription for the 1987-1988 Monitoring Period, 8 FCC Rcd 1876, 1880 (1993).

[21] *Liability Order*, 5 FCC Rcd at 4854.

[22] *Id.*

[23] *Id.*, citing *Special Access Order* at paras. 62-70 and Private Line Rate Structure Guidelines, 97 FCC 2d 923, 934-41 (1984).

V. CONCLUSION AND ORDERING CLAUSES

10. Based on the record before us, we find that New Valley has not met its burden of proving that it is entitled to an award of damages from PacBell for the violations found by the Commission in the *Liability Order*.[24]

11. Accordingly, pursuant to Section 4(i) of the Communications Act of 1934, 47 U.S.C. § 154(i), and under authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, IT IS ORDERED that the above-captioned supplemental complaint of New Valley IS DENIED and this proceeding IS TERMINATED.

12. IT IS FURTHER ORDERED that the Motion To Dismiss filed by Pacific Bell IS DISMISSED as moot.

13. IT IS FURTHER ORDERED that the Motion To Compel Answer To Interrogatories filed by New Valley IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief, Common Carrier Bureau

[24] We dismiss PacBell's motion to dismiss in light of our action on the merits of the complaint. We also deny New Valley's pending Motion To Compel Answers To Interrogatories. The interrogatories attempt to elicit information regarding the costs incurred by PacBell in providing the intrabuilding circuits to New Valley that we do not find to be relevant to a determination of damages in this proceeding. As emphasized above, the Commission has consistently rejected the view that the reasonableness of a private line rate must be based on the costs of the actual facilities used to provide service to a particular customer.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BellSouth Corporation

BellSouth Telecommunications, Inc. AAD 93-127

Request for Confidential Treatment
of Certain Financial Information
and
Release of Audit Findings

MEMORANDUM OPINION AND ORDER

Adopted: October 26, 1993; Released: October 29, 1993

By the Commission: Commissioner Barrett concurring and issuing a statement.

I. INTRODUCTION

1. BellSouth Corporation ("BSC"), its two telephone subsidiaries, hereafter referred to as the BellSouth Telephone Companies ("BTCs")[1] and their wholly-owned subsidiary, BellSouth Services ("BSS"), request confidential treatment of certain financial information submitted to Commission staff during a recent Common Carrier Bureau ("Bureau") audit of affiliate transactions.[2] For the reasons set forth below, we deny the requests for confidential treatment to the extent necessary to release the Summary of Audit Findings, and we authorize the Bureau to release the Summary of Audit Findings to the public pursuant to Section 220(f) of the Communications Act of 1934, as amended.[3]

II. BACKGROUND

2. BSS is a corporation created at divestiture to provide centralized procurement and support services to its owners, the BTCs. In 1990, Commission staff audited BSS and the BTCs. During the audit, cost accounting systems and the results operations for BSS' transactions with the BTCs for the period of January 1984 through June 1990 were examined. The Bureau prepared a Summary of Audit Findings, which contains the staff's findings concerning BSS' transactions with the BTCs. This document necessarily is based on information submitted by BSC, the BTCs and BSS during the course of the audit. The document itself summarizes and analyzes information, including financial data, that is subject to BSC's, the BTCs' and BSS' requests for confidentiality.

3. The auditors found that BSS, a nonregulated affiliate of BSC, achieved rates of return in excess of the Commission-prescribed authorized rate of return for the BTCs in every year except 1988.

4. The audit further found that BSS achieved these returns on investment through sales of services to the BTCs; that the BTCs apparently recorded the full charge for those services provided by BSS as regulated costs; and that the BTCs apparently passed on these costs to ratepayers. In all, BSS charged the BTCs $25.7 million more than would have been charged had BSS limited its earnings to the authorized rate of return. Of this amount, interstate ratepayers paid $6 million. With interest, $8.6 million would have been required by mid-1990 to put interstate ratepayers in the position they would have been in had BSS limited its earnings to the authorized rate of return.

5. Based on questions raised during the audit and on data requested by the auditors, the BTCs voluntarily reduced their capital accounts by $3.9 million in December of 1990 to remove from rate base the amount attributable to BSS earnings in excess of the authorized rate of return. They also reduced their rates for interstate access services in September, 1990, in order to return $14.3 million to interstate ratepayers.[4] Because of BSC's voluntary remedial actions, we have decided to take no further action with respect to the auditors' findings. However, as discussed below, we are releasing the staff's Summary of Audit Findings.

III. DISCUSSION

6. This Commission has a longstanding policy of respecting the confidentiality of information and documents obtained from common carriers during audits performed by Commission personnel. This policy recognizes that carriers have a legitimate interest in protecting confidential commercial or financial information and that public disclosure could result in competitive injury to carriers who provide such confidential information to the Commission. Moreover, this policy is designed to enhance the efficiency and integrity of our audit processes by encouraging carriers to comply in good faith with staff requests for information and documents. Although the Commission has a statutory right of access to documents and records of common carriers, we have recognized that carriers are more likely to voluntarily cooperate with Commission auditors in providing necessary information and documents when the Commission respects legitimate requests for confidential treatment.[5]

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[1] The BTCs are South Central Bell Telephone Company and Southern Bell Telephone & Telegraph Company.

[2] BSC's corporate structure has changed since the time of the audit. BSC has merged the BTCs and BSS into one regulated operating company, known as BellSouth Telecommunications, Inc. For purposes of clarity, the BSC entities at issue herein are referred to by the corporate names they operated under at the time of the audit.

[3] 47 U.S.C. §220(f). This *Order* does not address the sufficiency of BSC's, the BTCs' and BSS' confidentiality requests with respect to the raw financial data other than those data that are contained in the Summary of Audit Findings, or any other information obtained during the course of the audit.

[4] The BellSouth Telephone Companies, Tariff F.C.C. No. 4, 9th Revised Page 3-16, effective September 1, 1990; *see* Letter to Common Carrier Bureau from R.W. Fleming, dated August 17, 1990.

[5] *See* Bell Communications Research, Inc., Public Release of Information Obtained During Joint Audit, *Memorandum Opinion and Order*, 7 FCC Rcd 891, 892 (1992) (*"Bell Order"*); National Exchange Carrier Ass'n, Request for Confidential Treatment of Certain Financial Information, *Memorandum*

7. The Commission's policy concerning the confidentiality of information obtained during audits emanates from Section 220(f) of the Communications Act and Exemption 4 of the Freedom of Information Act ("FOIA").[6] Section 220(f) of the Communications Act prohibits the public disclosure by Commission personnel of facts and information obtained during an audit absent a Commission or court order. Exemption 4 of the FOIA permits the Commission to withhold from public inspection confidential commercial or financial information. These statutory provisions reflect a congressional recognition that businesses that provide sensitive commercial and financial information to government agencies retain a legitimate interest in preserving the confidentiality of that information.

8. Accordingly, the Commission withholds from public disclosure raw financial data obtained from carriers during audits as well as audit workpapers compiled by Commission staff.[7] Likewise, our general policy is to withhold from public disclosure audit reports prepared by Commission staff.[8] In the vast majority of instances, such reports are based on information provided by carriers subject to claims of confidentiality. Moreover, the Commission considers such audit reports to be internal agency documents that generally should not be disclosed because they present preliminary staff findings and recommendations to assist the Commission in pre-decisional deliberations. We have departed from this general policy and released audit reports prepared by Commission staff only in exceptional cases when we have determined: (1) that the summary nature of the data and information contained in a particular report is not likely to cause the providing carrier substantial competitive injury; (2) that release of summary data and information is not likely to impair our ability to obtain such information in future audits; and (3) that overriding public interest concerns favor release of the report.[9]

9. The underlying concerns that normally lead us to withhold audit information from public disclosure are diminished or outweighed in this case. Disclosure of the information in question in these circumstances is not likely to cause BSC, BSS or the BTCs competitive harm, substantial or otherwise. The Summary of Audit Findings contains no detailed underlying financial information submitted by BSC, the BTCs and BSS during the course of the audit; rather, it contains only data and financial information presented in summary form. The data and information contained in the Summary of Audit Findings are a result of the analysis and aggregation of the underlying data and information submitted by BSC, the BTCs and BSS. Assuming arguendo that competition exists for the services and products at issue, the summary nature of the information contained in the Summary of Audit Findings diminishes significantly the likelihood that BSC, the BTCs and BSS would suffer substantial competitive injury as a result of disclosure of the audit report. For instance, while the audit report shows BSS's return on investment for the years 1984 through the first six months of 1990, these figures would not be especially useful to any competitors in pricing their own products or services or devising competitive initiatives to challenge BSS since such information is not related to individual products.

10. Further, and especially given the unlikelihood of substantial competitive harm, we believe there is a significant public interest in disclosure of this Summary of Audit Findings. Transactions between regulated telephone companies and their nonregulated affiliates, such as the transactions examined in the audit, may lead to unreasonable rates and burden consumers when ratepayer safeguards are not observed. Release of the Summary of Audit Findings will serve to inform interested state regulatory commissions and consumers of the possible ratemaking implications of BSS' relationship with the BTCs.

11. Finally, in this instance we believe the public interest in disclosure warrants a limited exception to our general policy of maintaining the confidentiality of audit information in order not to impair our ability to obtain such information in the future. Unlike most audits that do not lead to enforcement action, we believe that limited disclosure is appropriate here in order to clarify the circumstances surrounding the voluntary remedial actions taken by BellSouth. We wish to make clear, however, that audit reports concerning common carrier matters are made available for public inspection only in "exceptional" cases.[10] Our general policy is to preserve the confidential status of audit reports, but we have determined here that, given the particular nature of these proceedings and the specific information at issue, disclosure of this Summary of Audit Findings is warranted.

12. Pursuant to Section 0.459(g) of the Commission's Rules,[11] BSC and BellSouth Telecommunications, Inc. will be afforded five working days in which to seek a judicial stay of this Commission ruling. We direct the Chief, Common Carrier Bureau, immediately upon Commission adoption of this order, to furnish by telephone to BSC and BellSouth Telecommunications, Inc. notice of our determination and of the time for seeking judicial stay, as well follow up notice in writing and a copy of the Summary of Audit Findings as set forth below.

IV. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), and Section 0.459 of the Commission's Rules, 47 C.F.R. §0.459 (1992), that the requests of

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Opinion and Order, 5 FCC Rcd 7184, para. 5 (1990) ("*NECA Order*"); J. David Stoner, On Request for Inspection of Records, *Memorandum Opinion and Order*, 5 FCC Rcd 6458, 6459, para. 12 (1990) ("*Stoner Order*"); Martha H. Platt, On Request for Inspection of Records, *Memorandum Opinion and Order*, 5 FCC Rcd 5742, para. 6 (1990) ("*Platt Order*"); Scott J. Rafferty, On Request for Inspection of Records, *Memorandum Opinion and Order*, 5 FCC Rcd 4138, para. 5 (1990) ("*Rafferty Order*"); Western Union Telegraph Co., On Request for Inspection of Records, *Memorandum Opinion and Order*, 2 FCC Rcd 4485, 4486, para. 11 (1987).

[6] 5 U.S.C. §552(b)(4).

[7] *See e.g. Stoner Order*, 5 FCC Rcd 6458; *Platt Order*, 5 FCC Rcd 5742; *Rafferty Order*, 5 FCC Rcd 4138.

[8] *See NECA Order*, 5 FCC Rcd 7184, 7185, n.15 (Commission's general policy is to preserve confidential status of audit reports); *Platt Order*, 5 FCC Rcd 5742, 5743, n.8.

[9] *See Bell Order*, 7 FCC Rcd 891, 892; *NECA Order*, 5 FCC Rcd 7184 (1990); New York Telephone Co., Request for Confidential Treatment of Certain Financial Information, *Memorandum Opinion and Order*, 5 FCC Rcd 874 (1990) ("*NYT Order*").)

[10] *See Bell Order*, 7 FCC Rcd at 892; *NECA Order*, 5 FCC Rcd 7184; 7185, n. 15; *Platt Order*, 5 FCC Rcd 5742, 5743, n.8, *citing NYT Order*, 5 FCC Rcd 874 (1990).

[11] 47 C.F.R. §0.459(g).

BellSouth Corporation, South Central Bell Telephone Company, Southern Bell Telephone & Telegraph Company and BellSouth Services for confidential treatment of certain financial information submitted in connection with the Common Carrier Bureau Audit ARE DENIED to the extent necessary to release the financial and operating data contained in the Summary of Audit Findings.

14. IT IS FURTHER ORDERED, pursuant to Section 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. §154(j), that a copy of this *Order* and the Summary of Audit Findings shall be served upon BellSouth Corporation and BellSouth Telecommunications, Inc.

15. IT IS FURTHER ORDERED, pursuant to Section 220(f) of the Communications Act of 1934, as amended, 47 U.S.C. §220(f), and Section 0.459(g) of the Commission's Rules, 47 C.F.R. §0.459(g) (1992), that the Common Carrier Bureau is authorized to release the Summary of Audit Findings for public inspection on the sixth working day following service of the report upon BellSouth Corporation and BellSouth Telecommunications, Inc., absent issuance of a judicial stay.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

CONCURRING STATEMENT
OF
COMMISSIONER ANDREW C. BARRETT

In the Matter of BellSouth Corporation, BellSouth Telecommunications, Inc., Request for Confidential Treatment of Certain Financial Information and Release of Audit Findings, [AAD 93-127]

This Memorandum Opinion and Order authorizes the Common Carrier Bureau (Bureau) to release a summary of the findings of a 1990 audit of the transactions between the BellSouth Telephone Companies ("BTCs") and their wholly-owned subsidiary, BellSouth Services ("BSS").[1] The Bureau audit found apparent violations of the Commission's affiliate transactions rules during the years 1984 to 1990 in connection with the sales of services to the BTCs by BSS.

I concur in this decision. My purpose in issuing this statement is to deter any misapprehensions this order might cause concerning the seriousness with which this Commission -- or at least this Commissioner -- views apparent violations of our affiliate transactions rules. This decision should not be construed as an indication that voluntary and prompt remedial action alleviates concerns about the apparent violations.[2] That is not the case. It remains my intent as a Commissioner to utilize the Commission's enforcement capabilities to the fullest extent feasible, consistent with the particular circumstances of any apparent violation of the Commission's rules.

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[1] Since the time of the audit, these companies merged into a single entity, known as BellSouth Telecommunications, Inc.

[2] In this instance the remedial actions included restitution to interstate ratepayers of overcharges resulting from the apparent violations.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 27, 1993

Finder's Preference Program - Revised Checklist

The Federal Communications Commission recently revised the procedures for handling finder's preference requests in the *Memorandum Opinion and Order,* PR Docket 90-481 released September 13, 1993. The new rules are effective as of November 1, 1993. This checklist is a guide to assist applicants in filing finder's preference requests. If you desire to file a finder's preference request you should obtain copies of:

1. *Report and Order,* PR Dkt 90-481, 6 FCC Rcd 7297(1991);

2. *Memorandum Opinion and Order,* PR Dkt 90-481, 8 FCC Rcd _____ (Released September 13,1993); and

3. Current list of Pending Finder's Requests (to check if the targeted station has been awarded to another finder, or is the subject of another finder's request).

Copies of these documents may be obtained by calling the Commission's Copy Contractor, ITS, at 202-857-3800.

This checklist is merely a summary; the Commission's *Report and Order* and the *Memorandum Opinion and Order* govern the program. This checklist supersedes the checklist released April 10, 1992, *Public Notice,* 7 FCC Rcd 2578(1992).

The Finder's Preference Program provides incentives to eligible persons who submit conclusive evidence to the Commission that results in the recovery of unconstructed or non-operational private land mobile channels licensed on an exclusive basis in the 220-222 MHz, 470-512 MHz, and 800/900 MHz bands (including 900 MHz phase I SMRS). Persons assisting the Commission in recovering these channels in these bands, and who satisfy the specified procedural requirements are entitled to a "preference" for channels ultimately recovered.

Finders must submit information to establish a *prima facie* case against the target licensee. The Commission will dismiss the request if the finder does not meet its burden of proof. Finder's requests must also meet specific procedural requirements. The Commission will return a request that contains a procedural error but will process such a request in its original place in line if the finder corrects and resubmits the request within 60 days of the date of the return notice. The Commission cautions, however, that finders are permitted one opportunity only to correct procedural errors. If a resubmitted request contains any procedural errors the Commission will dismiss it and the finder will forfeit its place in line and any filing fee. To avoid the return and/or dismissal of a finder's request, the request must:

1. State that the finder is seeking a finder's preference.

2. Provide the name, mailing address, and call sign of the target licensee (even if the finder believes the target is out of business).

3. List the licensed location and frequencies involved, not just refer, for example, to "the 800 MHz band."

4. List the Commission rule(s) that the finder alleges the target licensee is violating; include the benchmark dates the target licensee missed. Requests are not accepted which allege failure to construct or place in operation until 180 days after the applicable construction/placed in operation deadline.

5. Provide your statement--who, what, why, where, and when--about the violations you allege. Have witnesses provide separate statements. The finder has the burden of proving that violations have occurred. Avoid general or conclusory statements. Failure to present a *prima facie* case will result in the dismissal of the finder's preference request.

6. Submit all statements under oath or under penalty of perjury pursuant to Section 1.16 of the Commission's rules. 47 CFR § 1.16. Example: "I declare under penalty of perjury that the statements made in this finder's preference request are true and correct." No notarization is required. However, simply "subscribing" before a notary does not meet this requirement.

7. Send an original and three copies to the proper Commission address (service on the target licensee is no longer the responsibility of the finder):

a) If you are not fee exempt, send the request with a Form 155 and the correct fee (currently $105 per channel) to: Federal Communications Commission, Fee Correspondence, PO Box 358305, Pittsburgh, PA 15251-5305. The fee code is PDX.

b) Other correspondence including fee exempt requests and non-feeable correspondence should be addressed to: Federal Communications Commission, Finder's Preference Program, 1270 Fairfield Road, Gettysburg, PA 17325-7245.

8. Do not file an application (Form 574) for the targeted channels until you receive a finder's preference award letter from the Commission. You will have 90 days from the date of your award letter to file an acceptable application. (Consensual finder's may file applications as noted in para. 10.)

9. Each finder's request must stand on its own and must not cross-reference to other filings.

10. Certain special procedures are applicable to consensual preference requests where a finder gets an existing licensee to cancel its license voluntarily because the existing licensee will be unable to construct and operate by its deadline. File well before the existing licensee's construction and operation (8th month or 1 year) deadline. File the existing licensee's cancellation request with the finder's award request. Both the existing licensee and the finder must certify that they have not and will not give or receive any direct or indirect compensation in connection with the consensual license cancellation. The finder will assume the existing licensee's construction and operation deadline if the Commission grants an award letter and the finder's timely application.

In order to expedite processing and meet the construction/placed in operation dedline, consensual finders may file a license application (Form 574) when filing an award request. File your application separately following regular application requirements; reference that you filed a consensual finder's request for the channel(s) you seek. You may further expedite requests in order to meet the applicable construction deadline by calling the Licensing Division at 717-337-1212 to request expedited treatment.

If a finder's request states a *prima facie* case and meets all procedural requirements, the Commission will forward it to the target licensee and provide such licensee an opportunity to respond (generally 30 days).

For further information call the Licensing Division at 717-337-1212.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-358

In the Matter of

Amendment of Part 22 of the Commission's
Rules Relating to License Renewals in the
Domestic Public Cellular Radio
Telecommunications Service

ORDER

Adopted: August 17, 1993, Released: August 18, 1993

By the Commission:

1. Pending before the Commission are two petitions for reconsideration of the *Memorandum Opinion and Order on Reconsideration* (*Reconsideration Order*), 8 FCC Rcd 2834 (1993), in the above captioned proceeding.[1] Those petitions address, *inter alia*, character reporting requirements for cellular renewal applicants and entities filing applications challenging renewal applications. *See id.* at 2835 n.6. In order to permit the character reporting requirements to be considered more fully on reconsideration and because of some apparent industry confusion regarding them, we have decided, on our own motion, to suspend enforcement of the character reporting requirements set forth in footnote six of the *Reconsideration Order* pending our disposition of the petitions for reconsideration.[2]

2. Accordingly, IT IS ORDERED That enforcement of the character reporting requirements set forth in footnote six of our *Memorandum Opinion and Order on Reconsideration*, 8 FCC Rcd 2834, 2835 (1993), IS SUSPENDED pending the Commission's disposition of petitions for reconsideration on this issue in the above-captioned proceeding.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[1] BellSouth Corporation, BellSouth Enterprises, Inc. and BellSouth Cellular Corp. (collectively "BellSouth") and GTE Corporation on behalf of GTE Mobilnet Incorporated and Contel Cellular Incorporated filed a "Joint Petition for Clarification and Further Reconsideration" of the *Reconsideration Order*, while U S WEST New Vector Group, Inc. filed a "Petition for Limited Clarification" of that order. *See also* letter dated August 13, 1993, addressed to J. Cimko, Chief, Mobile Services Division, Common Carrier Bureau, from Bellsouth Corporation, U S WEST NewVector Group, Inc., Ameritech Mobile Communications, Inc., Bell Atlantic Mobile Services, Inc., McCaw Cellular Communications, Inc., NYNEX Mobile Communications Co., PacTel Cellular, Inc., Southwestern Bell Mobile Systems, and Cellular Telecommunications Industry Association. The referenced letter raised concerns regarding a Public Notice entitled "Information Regarding Cellular Renewal Applications," Report No. CL-93-129 (August 5, 1993), which stated, *inter alia*, that cellular renewal applicants must comply with certain reporting requirements set forth in footnote six of the *Reconsideration Order*.

[2] The first sentence of footnote six, which concerns the disclosure of the real parties in interest in each application, is not affected by this stay order.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-290

In the Matter of

Amendment of Section 76.51
of the Commission's Rules
to Include Newton, New Jersey,
and Riverhead, New York,
in the New York, New York-
Linden-Paterson-Newark,
New Jersey, Television Market

NOTICE OF PROPOSED RULE MAKING

Adopted: November 4, 1993; Released: November 16, 1993

Comment Date: December 20, 1993
Reply Comment Date: January 4, 1994

By the Chief, Mass Media Bureau:

1. Before the Commission is a petition for rule making filed June 14, 1993, by Mountain Broadcasting Corporation ("Mountain"), licensee of television station WMBC-TV, Channel 63 (Independent), Newton, New Jersey. Mountain seeks to amend Section 76.51 of the Commission's Rules, 47 C.F.R. §76.51, to change the designation of the New York, New York-Linden-Paterson-Newark, New Jersey, television market to "New York, New York-Linden-Paterson-Newark-Newton, New Jersey."[1] Also before the Commission is a petition for rule making filed July 14, 1993, by WLIG-TV, Inc. ("WLIG"), licensee of WLIG(TV), Channel 55 (Independent), Riverhead, New York, which seeks to add the community of Riverhead to the subject television market.[2]

BACKGROUND

2. Section 76.51 of the Commission's Rules enumerates the top 100 television markets and the designated communities within those markets. Among other things, this market list is used to determine territorial exclusivity rights under Section 73.658(m) and helps define the scope of compulsory copyright license liability for cable operators. *See* 47 CFR §76.658(m) and 17 U.S.C. §111(f). Some of the markets consist of more than one named community (a "hyphenated market"). Such "hyphenation" of a market is based on the premise that stations licensed to any of the named communities in the hyphenated market do, in fact, compete with all stations licensed to such communities. *See CATV-Non Network Agreements*, 46 FCC 2d 892, 898 (1974). Market hyphenation "helps equalize competition" where portions of the market are located beyond the Grade B contours of some stations in the area yet the stations compete for economic support. *See Cable Television Report & Order*, 36 FCC 2d 143, 176 (1972).

3. In evaluating past requests for hyphenation of a market, the Commission has considered the following factors as relevant to its examination: (1) the distance between the existing designated communities and the community proposed to be added to the designation; (2) whether cable carriage, if afforded to the subject station, would extend to areas beyond its Grade B signal coverage area; (3) the presence of a clear showing of a particularized need by the station requesting the change of market designation; and (4) an indication of benefit to the public from the proposed change. Each of these factors helps the Commission to evaluate individual market conditions consistent "with the underlying competitive purpose of the market hyphenation rule to delineate areas where stations can and do, both actually and logically, compete."[3]

4. Section 4 of the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act"),[4] which amended Section 614 of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. §614, requires the Commission to make revisions needed to update the list of top 100

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[1] The Commission has delegated to the Chief, Mass Media Bureau, authority to act on petitions for rule making seeking market redesignation and has stated that it expects "that requests for specific hyphenated market changes that appear worthy of consideration will be routinely docketed and issued as rulemaking proposals." *See Report and Order* in MM Docket No. 92-259 (Broadcast Signal Carriage Issues), 8 FCC Rcd 2965, 2977-78, n.150 (1993).

[2] Also pending before the Commission are various petitions for special relief involving the New York Area of Dominant Influence (ADI). For example, on May 28, 1993, Cablevision Systems Corporation ("Cablevision"), a cable operator with systems serving various communities within the New York ADI, filed a Petition for Special Relief (CSR-3873-A) requesting, among other things, modification of the ADI markets of WMBC-TV, Newton, NJ, and WLIG, Riverhead, NY, for must-carry purposes. Specifically, Cablevision seeks to exclude these stations from its must-carry obligations on those systems within the New York ADI that are alleged to be geographically remote, socially and politically distinct, and where viewership is negligible or nonexistent. Cablevision seeks to exclude WMBC-TV from mandatory carriage on certain of its New York and Connecticut systems, and seeks to exclude WLIG(TV) from mandatory carriage on certain of its New Jersey, New York, and Connecticut systems; Cablevision does not seek to exclude these stations from carriage on systems within the ADI that are more proximate to the subject stations' communities or that have historically carried the stations. Thus, while the Cablevision petition is directed to the must-carry status of these stations with regard to specific communities and certain systems within the ADI, the Mountain and WLIG petitions are instead directed to the copyright status of the stations *if* carried by market-area systems. Any action to amend Section 76.51 of the Rules as proposed is, in our view, without prejudice to Cablevision's efforts to defeat the must-carry status of these stations on certain specific systems within the subject ADI. An appropriate disposition of pending petitions for special relief, including Cablevision's and others', are proceeding on a separate track.

[3] *See, e.g., TV 14, Inc. (Rome, Ga.)*, 7 FCC Rcd 8591, 8592 (1992), *citing Major Television Markets (Fresno-Visalia, California)*, 57 RR 2d 1122, 1124 (1985). *See also Press Broadcasting Company, Inc.*, 8 FCC Rcd 94, 95 (1993).

[4] Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

television markets and their designated communities in Section 76.51 of the Commission's Rules. *See* Section 614(f) of the Act.[5] The Commission stated that where sufficient evidence has been presented tending to demonstrate commonality between the proposed community to be added to a market designation and the market as a whole, such cases will be considered under an expedited rulemaking procedure consisting of the issuance of a Notice of Proposed Rule Making based on the submitted petition.

THE MOUNTAIN PETITION: Newton, NJ

5. Mountain maintains that amendment of Section 76.51 of the Rules to include the community of Newton as a designated community in the subject television market is essential to make that rule comport with market realities. It states that Newton is less than 45 miles from, and that WMBC-TV's Grade B signal contour reaches a substantial portion of, all the currently designated communities in the market.[6] Moreover, Mountain asserts, WMBC-TV's Grade B contour significantly overlaps those of the commercial broadcasting stations licensed to the presently designated communities in the market, and that all but five of the twenty-two television stations in the subject ADI provide Grade B or better service to Newton.[7] Mountain also asserts that its competitive position in the market is further verified by Arbitron's inclusion of WMBC-TV as part of the New York ADI.

6. Mountain further alleges that the proposed rule amendment is critical to facilitate competition between WMBC-TV, a recently built UHF station, and other stations in the market with respect to carriage on market-area cable systems. It states that without such a rule change, it is unlikely that WMBC-TV will be carried on many of the cable systems in the station's ADI. Mountain relates that despite the fact that WMBC-TV has mandatory signal rights throughout the ADI, because Newton is not a designated community in the Section 76.51 market listings, the station is not considered a "local signal" for copyright purposes throughout the New York ADI in which it competes. While stations licensed to communities specifically designated in Section 76.51 are considered local for all cable systems within the 35-mile zones of all listed communities in a given hyphenated market, the absence of Newton as a designated community in this market list results in WMBC-TV's classification as a "distant signal" for market-area cable systems more than 35 miles from Newton. In this regard, Mountain states that it has received notices from various cable systems within the New York ADI advising that, pursuant to Section 76.58(d) of the Commission's Rules, they will not provide mandatory carriage of WMBC-TV unless the station agrees to reimburse over nine million dollars semi-annually in copyright royalty fees.[8] Mountain alleges that the estimated copyright costs for cable carriage "are so staggering that WMBC-TV is, in effect, prohibited from exercising its must-carry rights."

7. Mountain further contends that WMBC-TV will be at a severe competitive disadvantage unless accorded the same mandatory carriage status as the other stations licensed to communities in the subject hyphenated market. Mountain asserts that the fact that WMBC-TV is a new UHF independent station increases its competitive burden, and maintains that lost revenues resulting from WMBC-TV's limited access to viewers will jeopardize the continued survival of the station. Mountain asserts that, on the other hand, amendment of the market as proposed will greatly benefit the viewing public in the market. It maintains that WMBC-TV's news, local public affairs and independent program offerings contribute to the diversity of the market as a whole, and to New Jersey viewers in particular. Therefore, it asserts that redesignation of the market as proposed will not only place WMBC-TV on a level playing field with its competitors, but will also comport with the goal of assuring that local stations have access to cable subscribers and that subscribers have access to all stations in a television market. By amending the market as proposed, Mountain concludes that it will gain an equal competitive footing to gain the same access to viewers in the market enjoyed by other area stations.

THE WLIG PETITION: Riverhead, NY

8. In its petition, WLIG alleges that amendment of Section 76.51 of the Rules to include the community of Riverhead as a designated community in the subject market is critical to equalize competition between WLIG(TV) and other market-area stations. It notes that WLIG(TV) began operations in April, 1985, and is the only full-time independent station licensed to serve a Long Island community. WLIG further states that WLIG(TV) is part of the Arbitron-defined New York ADI "for TV sales, promotion, audience measurement, and programming purposes." It asserts that the station's programming and economic bases are ADI-wide in scope and directed to the tri-state interests and concerns of New York, New Jersey and Connecticut residents. WLIG states that despite the fact that the station operates in the largest television market in the country, its

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[5] In connection with the implementation of the broadcast signal carriage provisions of the Cable Act, the Commission concluded that a major update of Section 76.51 was not necessary based on the record then before it. Nevertheless, the Commission did make some minor revisions to Section 76.51 of the Rules, and announced that it would consider further revisions to the list of television markets on a case-by-case basis. *See Report and Order* in MM Docket No. 92-259, *supra*.

[6] Mountain states that its proposed change to Section 76.51 of the Rules will not greatly extend its access to viewers beyond WMBC-TV's Grade B signal contour. Moreover, citing *Report & Order* in MM Docket No. 84-111 (Melbourne and Cocoa, Florida) 57 RR 2d 685, 692 (1985), Mountain asserts that "some extension of rights into areas beyond a station's Grade B contour is permissible in a hyphenated market as long as the station largely gain[s] such rights in a significant area within that contour."

[7] Mountain states that ADI market stations WHAI(TV), Bridgeport, Connecticut, WTZA(TV), Kingston, WLIG(TV), Riverhead, WHSI(TV), Smithtown, and WTBY(TV), Poughkeepsie, New York, fail to provide Grade B or better service to Newton.

[8] Section 76.58(d) of the Commission's Rules required a cable operator to notify all local television stations by May 3, 1993, that they may not be entitled to mandatory carriage on the system because such carriage may cause an increased copyright liability to the cable system. Under the provisions of Section 76.55(c)(2) of the Rules, a local commercial television station otherwise entitled to mandatory carriage need not be carried on market-area cable systems if the station is considered a "distant signal" under the copyright compulsory license (17 U.S.C. §111) and the station does not agree to indemnify the cable operator for the increased copyright liability. *See Report and Order* in MM Docket No. 92-259, 8 FCC Rcd at 2973-74.

advertising has continued to be local, with only nominal national advertising revenues. In contrast, WLIG alleges that WCBS-TV -- the New York City station with the best Grade B signal coverage to Long Island -- attracts far more national advertisers "buying" Long Island, despite WLIG(TV)'s superior signal coverage to those areas. Thus, WLIG contends that amendment of Section 76.51 as proposed will equalize competition between WLIG(TV) and the New York City stations for programming, national advertising and audience while allowing the public to benefit from greater program diversity.[9]

9. In support of the proposed rule amendment, WLIG states that the 35-mile zone of WLIG(TV) intersects the 35-mile zone of the New York City television stations, but does not intersect the 35-mile zones of the New Jersey communities at the "extreme ends" of the market.[10] Further, it states that the Grade B signal contour of WCBS-TV ("as a representative New York City station") reaches within 10 miles of Riverhead, while WLIG(TV)'s Grade B contour encompasses a section of Queens, a part of New York City.[11] WLIG asserts that such overlapping contours "help demonstrate that the stations involved are components of the same TV market" in that they "rely on the area within their Grade B contours for economic support."

10. WLIG also asserts that its "particularized need" for the requested relief is based on the fact that while WLIG(TV)'s service area is an integral part of the New York ADI, the station cannot compete on an equal footing with the New York City stations for programming, national advertising and audience "because Riverhead is not recognized as being part of Market #1 or ADI #1." It reiterates that although the Long Island coverage areas of the New York City stations largely overlap WLIG(TV)'s coverage area, the fact that WLIG(TV) receives far less of the national advertising demonstrates the station's inequitable competitive position. Such a competitive disadvantage, in WLIG's view, is "exactly what the Commission has sought to cure via market hyphenations."

11. WLIG further states that addition of Riverhead to the Section 76.51 market listings will resolve a substantial problem created by the interplay of the different regulatory schemes for must-carry and program exclusivity. WLIG states that because Riverhead is more than 35 miles away from New York City, WLIG(TV) cannot obtain exclusivity for programming against New York City stations. As such, cable systems inside the New York City 35-mile zone will be entitled to assert exclusivity protection against duplicative syndicated programming broadcast by WLIG(TV), even though both stations have must-carry rights on such system. By adding Riverhead to the market as proposed, WLIG states that it will be permitted to purchase program exclusivity against the New York City stations, thereby eliminating the potential for syndicated exclusivity blackouts between must-carry stations. Additionally, WLIG contends that the absence of Riverhead as a designated community in the market results in WLIG(TV) being considered a "distant signal" under the compulsory copyright license.[12] Therefore, it asserts, in those instances where a cable system is located within the New York ADI but beyond Riverhead's 35-mile zone, WLIG(TV) ceases to become a must-carry station unless the station agrees to indemnify that system for increased copyright liability.

12. WLIG concludes that amendment of Section 76.51 as proposed will permit WLIG(TV) to overcome the competitive disadvantage the station faces "because its present market designation is not commensurate with its coverage area and its physical and economic location within the New York - New Jersey major market and the New York ADI." It asserts that the grant of its petition will enable it to significantly increase its news, public affairs and other non-entertainment programming to the benefit of the viewing audience throughout the market.

DISCUSSION

13. Based on the facts presented, we believe that sufficient cases for redesignation of the subject market have been set forth so that these proposals should be tested through individual rulemaking proceedings, including the comments of interested parties. It appears from the information before us that WMBC-TV and WLIG(TV) and stations licensed to communities in the New York, New York-Linden-Paterson-Newark, New Jersey, television market do compete for audiences and advertisers throughout much of the proposed combined market area, and that evidence has been presented tending to demonstrate commonality between the proposed community to be added to a market designation and the market as a whole.[13] Moreover, these proposals appear to be consistent with the Commission's policies regarding redesignation of a hyphenated television market.

14. Although we believe the specific proposals submitted warrant testing through the rulemaking process, this is a particularly large and complex market situation for which

[9] In this regard, WLIG notes that its petition is directed to the New York ADI as a whole, and is not intended to address the issue of national and regional cable advertising on Long Island, issues that are the subject a civil antitrust complaint it has filed against Cablevision in the United States District Court for the Eastern District of New York (Case No. CV-93-3019), and also a complaint it has filed with the Commission regarding Cablevision's compliance with the must-carry rules.

[10] WLIG states that its case is analogous to the Commission's action in *Report & Order* in MM Docket No. 84-111, *supra,* where the Commission evaluated, among other things, "whether most of the area where a station licensed to the proposed community would be afforded expanded carriage rights lies beyond its Grade B contours." It notes that because WLIG(TV)'s mandatory cable carriage rights derive from its location within the New York ADI -- not from the proposed hyphenation -- the addition of Riverhead as a designated community in Section 76.51 of the Rules will not increase the station's must-carry rights beyond that which the Rules already permit.

[11] From the information attached to WLIG's petition, it appears that the Grade B signal contours of WLIG(TV) and WCBS-TV overlap along the western and middle portions of Long Island, and the Grade B signals of WLIG(TV) and WNJU(TV), Linden, New Jersey ("as a representative New Jersey station") overlap, to a lesser extent, over the same general area.

[12] *See* discussion at paragraph 6 and footnote 8, *supra.*

[13] Our conclusion that WLIG's petition is sufficient to initiate a rule making proceeding on its proposal consistent with the *Report & Order* in MM Docket No. 92-259, *supra,* is without regard to the fact that its petition is premised, in part, on program exclusivity and competition issues that are among those matters presently under consideration in *Further Notice of Proposed Rulemaking* in Gen. Docket No. 87-24, 3 FCC Rcd 6171 (1988). Interested parties may wish to direct comment to this aspect of WLIG's proposal. *See* discussion at paragraph 14, *infra.*

adjustment is sought. We thus believe it may be useful to consider several alternative possibilities. First, we solicit comment on other mechanisms short of market hyphenation that might address some of the problems that WLIG has expressed concerning operation under the existing rules. In particular, WLIG has indicated that it cannot obtain exclusivity vis-a-vis stations in New York City because of the territorial exclusivity provisions of the rules (Section 73.658) that generally preclude stations in different markets from obtaining exclusivity against each other.[14] This rule was intended to protect a station such as WLIG, and the Commission has previously waived the rule when it was found to be interfering with rather than assisting its intended beneficiaries. *See Press Television Corp.*, 4 FCC Rcd 8799 (1989), *aff'd on recon.* 6 FCC Rcd 6563 (1991). Thus, we seek comment on the possibility of such a waiver in this context if it is determined that market hyphenation is inappropriate.

15. Second, although no petitions have been received seeking their inclusion as part of this hyphenated market, we seek comment on whether there are additional communities to which stations are licensed that may also warrant hyphenation along with Newton and/or Riverhead. We seek comment on this possibility in order to address potential anomalies associated with having some but not all of the stations in an ADI market included as hyphenated "designated" communities in the market. There is, for example, the potential anomaly of having an unhyphenated community in the midst of a hyphenated market. For example, Smithtown, New York, to which WHSI(TV) is licensed and which is not now a hyphenated community in the New York City market, is a Long Island community considerably closer to New York City than is Riverhead. Newton is considerably more distant from New York City than is Secaucus, New Jersey to which WWOR-TV is licensed. Accordingly, we seek specific comment on whether one or more of the following communities should also be included in Section 76.51 as designated communities in the market: Secaucus, Bridgeport, Poughkeepsie, Kingston, Smithtown.[15]

16. Third, we solicit comment on the possibility of only partially "hyphenating" the market so that, for example, Riverhead might be included with New York City in a common market and Newton included with New York City but Riverhead and Newton not joined as part of a common market designation. Such a partial hyphenation might be a potential means of including together stations truly competitive with each other without so treating stations at opposite ends of a large ADI market area.[16]

ADMINISTRATIVE MATTERS

Ex Parte Rules -- Non-Restricted Proceeding

17. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, provided they are disclosed as provided in the Commission's Rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203 and 1.1206(a).

Comment Information

18. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before December 20, 1993, and reply comments on or before January 4, 1994. All relevant and timely comments will be considered before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

Initial Regulatory Flexibility Analysis

19. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because if the proposed rule amendment is promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601 (3) of the Regulatory Flexibility Act. A few cable television system operators will be affected by the proposed rule amendment. The Secretary shall send a copy of this *Notice of Proposed Rule Making*, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

Additional Information

20. For additional information on this proceeding, contact Alan E. Aronowitz, Mass Media Bureau, (202)632-7792.

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[14] Section 73.658(m) of the Commission's Rules essentially prohibits exclusivity agreements that effect other television stations located in communities over 35 miles distant, except that stations may secure exclusivity against other stations licensed to another designated community in a hyphenated market specified in Section 76.51.

[15] Together with New York City, Newton, and Riverhead, these communities are included in the subject ADI by Arbitron. Moreover in this regard, we note that we have previously declined to include communities to a market unless they were specifically under consideration for redesignation pursuant to the issuance of a Notice of Proposed Rule Making ("NPRM"). *See, e.g., Report and Order* in MM Docket No. 92-259, *supra* at 2978, n.149; *Press Broadcasting Company, Inc.*, 8 FCC Rcd 3667, n.1 (1993). In those cases, an NPRM was issued soliciting public comment on a proposal involving a specific community. However, due to the nature of this particular proceeding, the size and complexity of the market involved, and the two interrelated, but independent, NPRM requests now before the Commission, we believe it is appropriate to solicit comment regarding the impact of these proposals on other communities in the market.

[16] This is a problem that has long been recognized but for which no fully satisfactory general solution has been developed. *See, e.g., Further Notice of Proposed Rulemaking* in Docket 18397, 22 FCC 2d 603, 607 (1969) (Suggesting possibility of hyphenation of some communities resulting in the creation of only a single market zone.)

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Comy Technology NAL 215CG0009
San Jose, California

Liability for Monetary
Forfeiture

ORDER

Adopted: November 4, 1993; Released: November 16, 1993

By the Field Operations Bureau:

I. INTRODUCTION

1. The Bureau has before it a Petition for Reconsideration filed by Comy Technology (Petitioner) pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, requesting reconsideration of the Bureau's July 22, 1992, action finding Petitioner liable for a monetary forfeiture in the amount of $700 for violating Section 302 of the Communications Act of 1934 as amended, 47 U.S.C. § 302(b) (the Act), and Section 2.803 of the Commission's Rules, 47 C.F.R. § 2.803. As explained below, we are cancelling the monetary forfeiture penalty.

II. BACKGROUND

2. Our records show that on April 8, 1992, an FCC inspector visited the Comdex Computer Show in Chicago, Illinois. He observed a computer monitor that had no FCC ID and showed a model number of "HSC-144A". There was no evidence present that the monitor had been certified as required by Section 15.101 of the Commission's Rules, 47 C.F.R. §15.101. A Notice of Apparent Liability For Monetary Forfeiture in the amount of $7,000 was issued to Comy Technology on May 20, 1992. Comy replied by letter dated May 26, 1992.

3. The May 26 reply includes information that the monitor exhibited at the Comdex Show was model "HSM-144A" not "HSC-144A", and that this device was certified under FCC ID number IZLHM-441. The Chicago Office issued Comy a letter of forfeiture on June 10, 1992. On June 19th, Comy submitted another response. Upon review of the response, the Chicago Office issued Comy a Further Forfeiture Order, but reduced the forfeiture to $700.

4. Comy Technology claims that it should not be subject to a monetary forfeiture penalty, since it was not in violation of Section 302(b), 47 U.S.C. § 302(b) or Section 2.803 of the Commission's Rules, 47 C.F.R. § 2.803, which require certification.

III. DISCUSSION AND CONCLUSION

5. We find merit to the claims presented. This enforcement matter would not have occurred had the monitor possessed a label in accordance with Section 2.925(a)(1) of the Commission's Rules, 47 C.F.R. § 2.925(a)(1); however, since this violation or its regulatory basis was not cited in the original NAL, this monetary forfeiture will be cancelled.

6. Section 1.80(f) of the Commission's Rules, 47 C.F.R. §1.80(f), establishes certain minimum requirements which must be provided in the NAL to provide adequate notice. We agree that the NAL, as written, failed to meet this minimum requirement.

IV. CONCLUSION

7. For the reasons stated above, we are cancelling the finding of liability for monetary forfeiture in the amount of $700.

V. ORDERING CLAUSES

8. IT IS ORDERED that pursuant to Section 503(b) of the Communications Act of 1934 and Section 1.106 of the FCC's rules, that the relief sought in the Petition for Reconsideration filed by Comy Technology is *GRANTED*. 47 C.F.R. § 1.106.

9. IT IS FURTHER ORDERED that a copy of this Order shall be sent by certified mail, return-receipt requested, to Comy Technology, 62 Bonaventura Drive, San Jose, California, 95134.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-278

In the Matter of

Amendment of Section 73.202(b), RM-8344
Table of Allotments,
FM Broadcast Stations.
(Pequot Lakes, Minnesota)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 29, 1993; Released: November 17, 1993

Comment Date: January 10, 1994
Reply Comment Date: January 25, 1994

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Minnesota Christian Broadcasters, Inc. ("petitioner"), seeking the allotment of Channel 261A to Pequot Lakes, Minnesota, as that community's second FM broadcast service.[1] Petitioner submitted information in support of the proposal and stated its intention to file an application for Channel 261A if the channel is allotted to Pequot Lakes.[2]

2. We believe petitioner's proposal warrants consideration. Channel 261A can be allotted to Pequot Lakes, Minnesota, in compliance with the minimum distance separation requirements of the Commission's Rules without a site restriction.[3] We do note, however, that grant of a final license for Channel 261A at Pequot Lakes may be withheld until Station KTIG, Channel 261A, is licensed on Channel 274C2.[4] Since Pequot Lakes is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government will be obtained for this allotment.

3. In view of the fact that the proposed allotment would provide a second local FM broadcast service to Pequot Lakes, Minnesota, the Commission believes it would serve the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

City	Channel No. Present	Proposed
Pequot Lakes, Minnesota	274C2	261A, 274C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 10, 1994,** and reply comments on or before **January 25, 1994,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Dennis F. Begley
Reddy, Begley & Martin
1001 22nd Street, N.W., Suite 350
Washington, D.C. 20037

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an

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[1] Petitioner is the licensee of Station KTIG, Channel 274C2, Pequot Lakes. The license for Station KTIG was modified in MM Docket 92-102 to specify operation on Channel 274C2 in lieu of Channel 261A. *See* 7 FCC Rcd 6215 (1992).

[2] The Commission adopted new local ownership rules based on market size and audience share which enables petitioner to file an application for Channel 261A at Pequot Lakes, if allotted. For stations in markets with fewer than 15 radio stations, a single licensee will be permitted to own up to three stations, no more than two of which are in the same service, provided that the owned stations represent less than 50 percent of the stations in the market. *See Revision of Radio Rules and Policies, Memorandum Opinion and Order and Further Notice of Proposed Rule Making,* 7 FCC Rcd 6387 (1992). Petitioner did not provide information showing it is eligible to acquire a second station at Pequot Lakes, and is therefore requested to do so in its comments.

[3] The coordinates for Channel 261A at Pequot Lakes are 46-36-11 and 94-18-33.

[4] Petitioner was granted a construction permit (BPH-921215IG) for Channel 274C2 at Pequot Lakes on May 25, 1993, which expires on November 25, 1994, at coordinates 46-40-48 and 94-25-02.

ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-282

In the Matter of

Amendment of Section 73.202(b), RM-8371
Table of Allotments,
FM Broadcast Stations.
(Eureka, Nevada)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 29, 1993; Released: November 17, 1993

Comment Date: January 10, 1994
Reply Comment Date: January 25, 1994

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Keith E. Lamonica ("petitioner") requesting the allotment of Channel 233A to Eureka, Nevada, as the community's first local aural transmission service. Petitioner states that he will apply for the channel, if allotted.[1]

2. We believe the public interest would be served by proposing the allotment of Channel 233A to Eureka since it could provide the community with its first local FM service. Channel 233A can be allotted to Eureka in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Eureka, Nevada	--	233A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 10, 1994,** and reply comments on or before **January 25, 1994,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Keith E. Lamonica
501 Aultman
Ely, Nevada 89301
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND

[1] Petitioner, in addition to providing locally-oriented service to Eureka, desires to construct several stations and "tie them together" as one network. To this end, he has also proposed the allotment of FM channels at Alamo, Cherry Creek, Austin, Baker, Lund, Pioche and Ely, Nevada.

[2] The coordinates for Channel 233A at Eureka are North Latitude 39-30-46 and West Longitude 115-57-35.

the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-277

In the Matter of

Amendment of Section 73.202(b), RM-8324
Table of Allotments,
FM Broadcast Stations.
(Warrior, Alabama)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 29, 1993; Released: November 17, 1993

Comment Date: January 10, 1994
Reply Comment Date: January 25, 1994

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of North Jefferson Broadcasting Company, Inc. ("petitioner"), permittee of Station WLBI(FM), Channel 254A, Warrior, Alabama, seeking the substitution of Channel 254C3 for Channel 254A at Warrior and modification of its authorization to specify operation on the higher powered channel.[1] Petitioner stated its intention to apply for Channel 254C3 if allotted to Warrior, as requested.

2. We believe the public interest would be served by proposing the substitution of Channel 254C3 for Channel 254A at Warrior since it could provide an expanded coverage area FM service to the community.

TECHNICAL STATEMENT

3. Channel 254C3 can be allotted to Warrior at the petitioner's specified site, located 9.5 kilometers (5.9 miles) northwest of the community at coordinates 33-53-04 and 86-52-01, consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules.

4. The petitioner's modification request at Warrior conforms with the provisions of Section 1.420(g) of the Commission's Rules. Therefore, we shall propose to modify the permit of Station WLBI(FM) without entertaining competing expressions of interest in the use of Channel 254C3 at Warrior, or requiring the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

5. In view of the above, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Warrior, Alabama, as follows:

	Channel No.	
City	Present	Proposed
Warrior, Alabama	254A	254C3

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **January 10, 1994,** and reply comments on or before **January 25, 1994,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Richard J. Hayes, Esq.
13809 Black Meadow Road
Spotsylvania, VA 22553

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who

[1] The availability of Channel 254C3 at Warrior results from a Joint Request for Approval of Settlement Agreement between the petitioner herein and Radio South, Inc. ("RSI"), licensee of Station WFFN(FM), Channel 237A, Cordova, Alabama, whereby RSI withdrew its petition for reconsideration in MM Docket No. 90-476. *See* 8 FCC Rcd _____ (1993). Although RSI had requested a modification of its license for Station WFFN(FM) to specify operation on Channel 254C3 at Cordova, Alabama, in MM Docket No. 90-476, it was subsequently modified to Channel 223A. *See* 7 FCC Rcd 5489 (1992).

filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-283

In the Matter of

Amendment of Section 73.202(b), RM-8374
Table of Allotments,
FM Broadcast Stations.
(Pillager, Minnesota)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 29, 1993; Released: November 17, 1993

Comment Date: January 10, 1994
Reply Comment Date: January 25, 1994

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by NorMin Broadcasting Co. ("petitioner"), seeking the allotment of Channel 240A to Pillager, Minnesota, as that community's first local aural transmission service. Petitioner provided an engineering study in support of the petition and indicated it would apply for the channel, if allotted.

2. We believe the proposal warrants consideration because the proposed allotment would provide a first local aural transmission service to Pillager, Minnesota. Channel 240A can be allotted to Pillager consistent with the minimum distance separation requirements of the Commission's Rules provided there is a site restriction 9.2 kilometers (5.7 miles) southeast of the community.[1] The site restriction will prevent a short spacing to Station WJJY-FM, Channel 294C1, Brainerd, Minnesota. Since Pillager is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government will be requested for this allotment.

3. In view of the fact that the proposed allotment would provide a first local FM service to Pillager, Minnesota, the Commission believes it would serve the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Pillager, Minnesota	----	240A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 10, 1994,** and reply comments on or before **January 25, 1994,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows: John F. Garziglia, Pepper & Corazzini, 1776 K Street, N.W., Washington, D.C. 20006.

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Com-

[1] The coordinates for Channel 240A at Pillager are 46-14-59 and 94-26-33.

mission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-280

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments, RM-8369
FM Broadcast Stations.
(Lund, Nevada)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 29, 1993; Released: November 17, 1993

Comment Date: January 10, 1994
Reply Comment Date: January 25, 1994

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Keith E. Lamonica ("petitioner") requesting the allotment of Channel 264A to Lund, Nevada, as the community's first local aural transmission service. Petitioner states that he will apply for the channel, if allotted.[1]

2. Section 307(b) of the Communications Act of 1934, as amended, mandates that the Commission fairly, equitably, and efficiently distribute frequencies " . . . among the several States and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or is listed in the U.S. Census, that is sufficient to demonstrate its status.[2] Lund is not listed in the U.S. Census. Therefore, the petitioner should present the Commission with sufficient information to demonstrate that Lund is incorporated, or that it has social, economic, cultural, or governmental indicia to qualify it as a "community" for allotment purposes. See, *e.g., Beaver Springs, Pennsylvania,* 4 FCC Rcd 5373 (1989), *Sargent, Nebraska,* 4 FCC Rcd 3933 (1989), *Bartow, Georgia, et al.,* 4 FCC Rcd 6876 (1989), *East Hemet, California, et al.,* 4 FCC Rcd 7895 (1989), and *Ellwood, California,* 50 Fed. Reg. 13031, published April 2, 1985.

3. We believe the public interest would be served by proposing the allotment of Channel 264A to Lund, if it is ultimately found to be a community for allotment purposes, since it could provide a first local FM service to the community. Channel 264A can be allotted to Austin in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[3]

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Lund, Nevada	–	264A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **January 10, 1994,** and reply comments on or before **January 25, 1994,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Keith E. Lamonica
501 Aultman
Ely, Nevada 89301
(Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the

[1] Petitioner, in addition to providing locally-oriented service to Lund, desires to construct several stations and "tie them together" as one network. To this end, he has also proposed the allotment of FM channels at Alamo, Cherry Creek, Ely, Baker, Austin, Pioche and Eureka, Nevada.

[2] We note that Lund is listed in the 1993 Rand McNally Commercial Atlas and attributed with a population of 330 persons. However, mere geographical location is not sufficient to establish "community" status. *See, Vimville, Mississippi,* 48 FR 5974 (1983), *Hannibal, Ohio,* 6 FCC Rcd 2144 (1991), and *Columbia, California,* 56 FR 26357 (1991), 6 FCC Rcd 3292 (1991).

[3] The coordinates for Channel 264A at Lund are North Latitude 38-51-24 and West Longitude 115-00-25.

other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

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(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-285

In the Matter of

Amendment of Section 73.202(b), RM-8376
Table of Allotments,
FM Broadcast Stations.
(Alamo, Nevada)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 29, 1993; Released: November 17, 1993

Comment Date: January 10, 1994
Reply Comment Date: Janary 25, 1994

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Keith E. Lamonica ("petitioner") requesting the allotment of Channel 228A to Alamo, Nevada, as the community's first local aural transmission service. Petitioner states that he will apply for the channel, if allotted.[1]

2. Section 307(b) of the Communications Act of 1934, as amended, mandates that the Commission fairly, equitably, and efficiently distribute frequencies " . . . among the several States and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or is listed in the U.S. Census, that is sufficient to demonstrate its status.[2] Alamo is not listed in the U.S. Census. Therefore, the petitioner should present the Commission with sufficient information to demonstrate that Alamo is incorporated, or that it has social, economic, cultural, or governmental indicia to qualify it as a "community" for allotment purposes. See, *e.g., Beaver Springs, Pennsylvania,* 4 FCC Rcd 5373 (1989), *Sargent, Nebraska,* 4 FCC Rcd 3933 (1989), *Bartow, Georgia, et al.,* 4 FCC Rcd 6876 (1989), *East Hemet, California, et al.,* 4 FCC Rcd 7895 (1989), and *Ellwood, California,* 50 Fed. Reg. 13031, published April 2, 1985.

3. We believe the public interest would be served by proposing the allotment of Channel 228A to Alamo, if it is ultimately found to be a community for allotment purposes, since it could provide a first local service to the community. Channel 228A can be allotted to Alamo in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[3]

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Alamo, Nevada	--	228A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **January 10, 1994,** and reply comments on or before **January 25, 1994,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Keith E. Lamonica
501 Aultman
Ely, Nevada 89301
(Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the

[1] Petitioner, in addition to providing locally-oriented service to Alamo, desires to construct several stations and "tie them together" as one network. To this end, he has also proposed the allotment of FM channels at Austin, Cherry Creek, Ely, Baker, Lund, Pioche and Eureka, Nevada.

[2] We note that Austin is listed in the 1993 Rand McNally Commercial Atlas and attributed with a population of 400 persons. However, mere geographical location is not sufficient to establish "community" status. *See, Vimville, Mississippi,* 48 FR 5974 (1983), *Hannibal, Ohio,* 6 FCC Rcd 2144 (1991), and *Columbia, California,* 56 FR 26357 (1991), 6 FCC Rcd 3292 (1991).

[3] The coordinates for Channel 228A at Alamo are North Latitude 37-21-54 and West Longitude 115-09-49.

other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

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3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding. and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that. they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

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6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-281

In the Matter of

Amendment of Section 73.202(b), RM-8370
Table of Allotments,
FM Broadcast Stations.
(Austin, Nevada)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 29, 1993; Released: November 17, 1993

Comment Date: January 10, 1994
Reply Comment Date: January 25, 1994

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Keith E. Lamonica ("petitioner") requesting the allotment of Channel 259A to Austin, Nevada, as the community's first local aural transmission service. Petitioner states that he will apply for the channel, if allotted.[1]

2. Section 307(b) of the Communications Act of 1934, as amended, mandates that the Commission fairly, equitably, and efficiently distribute frequencies " . . . among the several States and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or is listed in the U.S. Census, that is sufficient to demonstrate its status.[2] Austin is not listed in the U.S. Census. Therefore, the petitioner should present the Commission with sufficient information to demonstrate that Austin is incorporated, or that it has social, economic, cultural, or governmental indicia to qualify it as a "community" for allotment purposes. See, *e.g., Beaver Springs, Pennsylvania,* 4 FCC Rcd 5373 (1989), *Sargent, Nebraska,* 4 FCC Rcd 3933 (1989), *Bartow, Georgia, et al.,* 4 FCC Rcd 6876 (1989), *East Hemet, California, et al.,* 4 FCC Rcd 7895 (1989), and *Ellwood, California,* 50 Fed. Reg. 13031, published April 2, 1985.

3. We believe the public interest would be served by proposing the allotment of Channel 259A to Austin, if it is ultimately found to be a community for allotment purposes, since it could provide a first local aural transmission service to the community. Channel 259A can be allotted to Austin in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[3]

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Austin, Nevada	--	259A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **January 10, 1994,** and reply comments on or before **January 25, 1994,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Keith E. Lamonica
501 Aultman
Ely, Nevada 89301
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[1] Petitioner, in addition to providing locally-oriented service to Austin, desires to construct several stations and "tie them together" as one network. To this end, he has also proposed the allotment of FM channels at Alamo, Cherry Creek, Ely, Baker, Lund, Pioche and Eureka, Nevada.

[2] We note that Austin is listed in the 1993 Rand McNally Commercial Atlas and attributed with a population of 370 persons. However, mere geographical location is not sufficient to establish "community" status. *See, Vimville, Mississippi,* 48 FR 5974 (1983), *Hannibal, Ohio,* 6 FCC Rcd 2144 (1991), and *Columbia, California,* 56 FR 26357 (1991), 6 FCC Rcd 3292 (1991).

[3] The coordinates for Channel 259A at Austin are North Latitude 39-29-36 and West Longitude 117-04-07.

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FEDERAL COMMUNICATIONS COMMISSION

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Assistant Chief, Allocations Branch
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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-107

In re Applications of

DAVID A. RINGER	File No. BPH-911230MA
ASF BROADCASTING CORPORATION	File No. BPH-911230MB
WILBURN INDUSTRIES, INC.	File No. BPH-911230MC
SHELLEE F. DAVIS	File No. BPH-911231MA
OHIO RADIO ASSOCIATES, INC.	File No. BPH-911231MC

For Construction Permit for
an FM Station on Channel 280A,
in Westerville, Ohio

APPEARANCES

Arthur V. Belenduik and *Shaun A. Maher* behalf of David A. Ringer; *James A. Koerner* on behalf of ASF Broadcasting Corporation; *Eric C. Kravetz* and *Marjorie K. Conner* on behalf of Wilburn Industries; *Dan J. Alpert* on behalf of Shellee F. Davis; *Stephen Yelverton* and *John Hunter* on behalf of *Ohio Radio Associates Inc.; James Shook* and *Norman Goldstein* on behalf of Chief, Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE WALTER C. MILLER

Issued: November 8, 1993; Released: November 18, 1993

1. Five mutually-exclusive applicants remain in this contest for an FM station in Westerville, Ohio, on Channel 280A. They are: (1) David A. Ringer; (2) ASF Broadcasting Corporation; (3) Wilburn Industries, Inc.; (4) Shellee F. Davis; and (5) Ohio Radio Associates, Inc.

2. After both the prehearing and posthearing interlocutory pleading cycles had run their course, we only had to take evidence on one factual issue, the standard comparative issue.[1] That issue, along with the ultimate issue, remain to be resolved:

(1) To determine which proposal would, on a comparative basis, best serve the public interest; and

(2) To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

3. The Chief, Audio Services also indicated that there was a significant difference in the size of the areas and populations that would receive service from the proposals. So he called for comparative coverage evidence. See 58 F.R. 21580 published April 22, 1993 at para. 17.

4. We held the Prehearing Conference on August 16, 1993, the Evidentiary Admission Session on August 20, 1993, and the Hearing on August 31, 1993. However, at the close of the hearing there were still nine petitions to enlarge pending. So we were unable to close the evidentiary record until October 8, 1993 (See FCC 93M-642).

5. The five applicants and the Mass Media Bureau[2] filed their Proposed Findings of Fact and Conclusions of Law on October 25, 1993. The five applicants (sans Bureau) filed Reply Findings on November 4, 1993.

Issue 1: The Standard Comparative Issue Description of the Applicants

6. *David A. Ringer* and *Shellee F. Davis* have each applied as individual applicants.

7. *ASF Broadcasting Corporation,* an Ohio two-tiered corporation, has two stockholders. Thomas J. Beauvais owns 75% of the corporate equity; i.e., all of ASF's 750 non-voting shares of stock.

8. Ardeth S. Frizzell owns the remaining 25% of the equity; i.e., all of ASF's 250 voting shares of stock.

9. *Wilburn Industries, Inc,* an Ohio two-tiered corporation, has two stockholders. Charles W. Wilburn, the President, Secretary, Treasurer and sole Director owns 50% of the corporate equity; i.e., all 375 shares of the voting stock. His son, Bernard P. Wilburn owns the other 50% of the corporate equity; i.e., all 375 shares of the non-voting stock. Bernard Wilburn is neither an officer nor director.

10. *Ohio Radio Associates, Inc.* has four director-stockholders. Each stockholder owns 25% of the equity and a 25% voting interest. The four are John Carney, President; Joseph D. Carney, Secretary and Vice-President; James A. Carney, Treasurer and Vice-President; and John M. Mino, Assistant Secretary, Assistant Treasurer and Vice President. There are no non-voting stockholders.

Diversification of Mass Media

11. *David A. Ringer* presently owns 25% of, and is Treasurer, Secretary and Director of the licensee of Station WYBZ(FM), Crooksville, Ohio. However, he has pledged to sell his interest and terminate any connection he has with WYBZ(FM) if his application is granted. So Ringer will not be assessed a comparative diversification demerit.

12. *ASF Broadcasting Corporation's* voting stockholder, and 25% owner, Ardeth Frizzell, has no interest in any medium of mass communications. However, ASF's 75% owner, Thomas J. Beauvais, has other media interests.

[1] The air hazard issue that the Chief, Audio Services Division designated against the then applicant Westerville Broadcasting company Limited Partnership (WBC) was resolved in WBC's favor. See FCC 93M-275 released May 18, 1993. At their request WBC's application was later dismissed. See FCC 93M-510 released August 9, 1993.

[2] As is their custom the Mass Media has only addressed the comparative coverage question. See Finding 3 *supra*.

13. Beauvais owns 50% of the Patten Corporation. Patten owns the licensee of station WBTZ, Pinconning, Michigan. Patten also owns 50% of an FM permittee in Trussville, Alabama. The Trussville equity is non-voting stock.

14. Beauvais also owns 50% of GTE Leasing, Inc. GTE owns 80% of WFGR-FM, Grand Rapids, Michigan. He is currently WFGR-FM's General Manager.

15. Even though Beauvais holds himself out as an ASF non-voting stockholder, his 75% ASF ownership when combined with his other nearby holdings and his active role as WFGR-FM, Grand Rapid's General Manager warrants a substantial diversification demerit.

16. Neither *Wilburn Industries Inc.* nor its two shareholders have any connection with any other medium of mass communications.

17. *Shellee Davis* has no connection with any other medium of mass communications.

18. Neither *Ohio Radio Associates* nor any of its four stockholders have any connection with any other medium of mass communications other than minor stock interests (less than 5%) in publicly traded companies which might own mass media interests. Moreover, none of these noncognizable or nonattributable interests are located in either the Westerville or Columbus, Ohio market areas. So ORA also escapes any diversification demerit.

19. *Intermediate Diversification Findings.* Neither Ringer, Wilburn, Davis nor ORA will be assessed any diversification demerit. None of them have any cognizable or attributable interests in any medium of mass communications. Only ASF suffers a diversification demerit, but that demerit is substantial. Thomas J. Beauvais, ASF's 75% owner has substantial broadcast interests in two nearby Michigan stations; i.e., in Pinconning and Grand Rapids, Michigan. that warrants a substantial (but not decisional) diversification demerit. So ASF comparatively trails the field at this early juncture.

Best Practicable Service
Comparative Coverage

20. The following chart portrays the total areas and populations within each applicants proposed 1 mV/m contour:

Total Areas and Populations Served

Applicant	Area (Sq. Km)	Population
Ringer	2,363	604,567
ASF	2,052	607,783
Wilburn	1,828	404,608
Davis	2,319	629,837
ORA	2,476	597,617

21. All proposed service areas receive at least five other daytime aural services. At night, ORA will provide a fourth aural service to 19 square kilometers and 183 people, and a fifth aural service to 61 square kilometers and 2,251 people. No other applicant would bring nighttime service to an underserved area.

22. *Intermediate Coverage Findings.* Davis, ASF, Ringer and ORA would serve between 193,009 (48%) and 225,229 (56%) more people than Wilburn. So they will receive a very slight preference relative to Wilburn for overall service superiority. The differences between Davis, ASF, Ringer and ORA are too insubstantial to warrant any preference vis-a-vis each other.

23. With their fourth and fifth nighttime service to 183 and 2,251 people ORA merits a *very slight* preference over Davis, ASF and Ringer. ORA merits a *slight* preference over Wilburn because of their overall coverage advantage as well as this underserved area advantage.

24. All-in-all, only Wilburn loses any ground under the comparative coverage criterion, and not a great deal at that.

Integration of Ownership With Management
Quantitative Claim

25. *David A. Ringer.* Based on his sole proprietorship, David Ringer claims 100% quantitative integration. He intends to serve full-time as General Manager of his proposed facility. He will take overall responsibility for sales and personnel, and will implement the proposed station's EEO program.

26. David A. Ringer was born on March 20, 1941. He will terminate all other employment, relocate to Westerville, and serve as full-time General Manager of the station. Ringer is presently a full-time land developer.

27. Originally Ringer laid claim to substantial *local residence.* He represented that ". . . except from 1978 to 1986 when he resided at . . . Chillicothe, Ohio and during his time at Miami University in Oxford, Ohio from June 1961 to June 1962. . ." he had ". . . resided in the service area of the proposed station his entire life. . ."[3] See the Integration and Diversification Statement Ringer filed on May 10, 1993.

28. That representation soon started unraveling. After he was deposed Ringer substantially modified that claim. It was discovered that several of his past residences were not inside the service area of his proposed station. So Ringer amended his application. See FCC 93M-587 released September 15, 1993.

29. A little later, at the hearing, it developed that the rest of Ringer's past residences were also outside his proposed service area. See Davis Ex.5; Tr. 276-277, 278-281. Thus Ringer's representation that he had ". . . resided in the service area of the proposed station his entire life" turned out to be totally false. Consequently he'll be given no credit for that criterion.

30. Ringer has pledged (for what it's worth) to relocate to Westerville if his application is granted.

31. Similarly, Ringer will not receive any comparative credit for his claimed *civic activities.* He concedes that some of those activities occurred outside his proposed 1 mV/m contour. And he has failed to demonstrate that the other claimed activities took place within that contour.

32. Ringer lays claim and will be credited with some *past broadcast experience.* From 1961-1962 when he was a student at Miami University he was a News Reporter for WMUB(FM); from 1961-1972 he was a full-time disk jockey and production person, and the afternoon and weekend Program Director at WLNO(FM), London, Ohio; and from 1990 to the present he has been Secretary, Treasurer and

[3] From April, 1992 to the present Ringer has resided in 417 West Sixth Avenue, Columbus, Ohio. He cannot receive credit for this searchlight residence; i.e., one he moved to after he filed his application on December 30, 1991.

Director of WYBZ(FM), Crooksville, Ohio. He is not employed by Station WYBZ. But he visits the station about one day per week; i.e., 8 hours per week. He pays the station's bills and does some production work.

33. Being a White non-Hispanic Ringer claims no *minority enhancement.* If his application is granted he will install *auxiliary power* generators at both his proposed studio and transmitter.

34. *ASF Broadcasting Corporation.* ASF claims 100% quantitative integration. They intend to integrate their sole voting stockholder, Ardeth Frizzell, into the station's day-to-day operation. Although Ms. Frizzell only owns 25% of the station's equity (Thomas J. Beauvais owns the other 75%), she intends to be the station's full-time General Manager. She will terminate all other business or employment if ASF's application is granted. She will be in full charge of both personnel and operations.

35. Ardeth Frizzell is 51 years old. She was born in and still resides in Columbus, Ohio, outside the 1 mV/m contour of her proposed station. So she'll receive no credit for *local residence.* In fact Ms. Frizzell doesn't propose to move to Westerville even if her application is granted.

36. Ms. Frizzell started in broadcasting back in 1973. She started as a research assistant for WCOL and WXGT. In 1976 she became a promotion assistant; in 1978 she was promoted to assistant bookkeeper; and from 1982-1985 she was computer coordinator/traffic assistant.

37. In 1985 Ms. Frizzell began working at station WBBY, Westerville, Ohio, the station ASF now seeks to activate. She started as traffic manager. Later she became business manager. In 1990 she became general manager of the station, and held that position until the station went off the air on December 31, 1991. As General Manager she supervised a staff of 25 people. She was responsible for virtually all day-to-day operations.

38. Since February 1992, Ms. Frizzell has been business and traffic manager at station WCKX, London, Ohio.

39. Based on the foregoing (Paras. 37-38 *supra.*), and assuming that 75% equity holder Thomas J. Beauvais (See Paras. 16-17 *supra.*) doesn't preempt her as General Manager,[4] Ardeth Frizzell is entitled to and will be credited with substantial *past broadcast experience.*

40. Ms. Frizzell claims *civic participation* based on work she performed while employed at Station WBBY, Westerville. See para. 37 *supra.* She says she participated in drives to collect shoes for homeless in 1990 and 1991, and helped raise funds for TV Discovery Playground and for Children's Hospital. However, at her deposition, she admitted that her only participation in the station's fundraising efforts was to ". . . talk to the people [from Discovery and the Hospital] and [she] talked to the public service director and seen what she needed to do finish implementing [the promotion] . . . that's all [she] did."

41. Since we don't know the nature of her "participation" and "help"; since we don't know how much time she spent participating in those activities; and since we don't know whether the organizations allegedly benefitted were inside or outside ASF's proposed 1 mV/m contour, Frizzell's speculative claim for civic participation credit will be denied.

42. Being a White non-Hispanic, Ardeth Frizzell seeks no *minority enhancement.* ASF intends to install *auxiliary power* generators at both their studio and the transmitter.

43. *Wilburn Industries, Inc.* Wilburn claims 100% quantitative integration. They will integrate their President, Secretary, Treasurer and sole Director Charles Wilburn into the proposed station's day-to-day operations. Charles Wilburn, who owns 50% if the corporation's equity, would serve as the station's full-time General Manager. He will oversee the station's day-to-day operations, supervise its programming, its sales, its promotional and its internal activities. He will hire, promote, and terminate the station's employees, and will see to it that the station's EEO program is implemented.

44. Born on April 23, 1929, Charles Wilburn lives in Upper Arlington, Ohio. He has practiced law in Circleville, Ohio, since 1964. Currently he is in a general practice firm with his son Bernard. To fulfill his full-time integration pledge Charles Wilburn will retire from his legal practice and turn over his legal business to his son Bernard. After he does that, Charles Wilburn will not receive any of the fee income from the firm.

45. Neither Upper Arlington nor Circleville are within the station's proposed 1 mV/m contour. So Wilburn can claim no comparative credit for either *local residence* or *civic participation.* However, Charles Wilburn pledges to move to Westerville if Wilburn's application is granted.

46. Charles Wilburn has no past *broadcast experience,* and Wilburn does not seek *auxiliary power* credit. Since he is a non-Hispanic White, Charles Wilburn can lay no claim to minority enhancement.

47. *Shellee Davis.* As a sole proprietor Shellee Davis claims 100% quantitative integration. She will put in a minimum of 40 hours a week as the station's General Manager. She will oversee and assume ultimate responsibility for the station's day-to-day activities, and supervise the sales, on-the-air, and general office departments. She will hire and fire and will manage the Public File. She will oversee the Equal Employment Opportunity Program and all commercial production.

48. Born on April 18, 1956, Shellee Davis lives at 463 Jessing Trail, Worthington, Ohio, within her proposed service area. She *has resided* within her proposed service area since 1984. Moreover, if her application is granted she will relocate to Westerville.

49. After earning a bachelor's degree in sociology from Wright State University and a master's degree in criminal justice from Rutgers University, Ms. Davis founded her own business in 1988. She is presently President of and owns Britt Business Systems. Britt distributes office equipment for Panasonic Industrial Company and the Xerox Corporation.

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[4] The Shareholders Agreement between Frizzell and Beauvais provides that he alone will provide the funds to construct and operate ASF's proposed station. Ms. Frizzell has already contributed her $12,000, the only amount required of her. So, as a practical matter, Beauvais will bear the entire cost of prosecuting the ASF application from the hearing session onward. The signed Shareholder's Agreement contains no restrictions on Beauvais' future employment at the station, on his serving as an independent contractor or agent, on his ability to transact business in the name of the corporation or about his communicat-

50. A hands-on manager Davis has turned Britt into a highly successful operation.[5] However, to effectuate her full-time integration pledge, Ms. Davis will sell Britt and terminate all other paid employment.[6]

51. Shellee Davis claims and is entitled to substantial comparative credit for *civic participation*. From 1988 to the present she has been an active member of the Columbus Chamber of Commerce; for the last four years she has belonged to the Columbus chapter of Links (a National Women's civic organization). She has chaired various committees in Links.

52. She participated in the United Way program called Project Diversity in 1990-1991; she has been a member of the Columbus Speech and Hearing board from 1991 to the present; and she was a member of the New Salem Baptist Church Business Development Board.

53. Ms. Davis assisted in the fundraising efforts for the King Center annual Campaign Chair for Black Owned business in 1991-1992; she was a Center for New Directions Panelist in 1991; she was a Member of the United Way business Development Committee in 1991; and she was a Linden-McKinley High School Presenter in 1991.

54. She has been an Ohio State University's Young black Scholarship Program participant from 1987 to the present, a Red Cross Neighborhood volunteer in 1990, a Columbus Chamber of Commerce Project Future Mentor in 1991, and a member of the Columbus Regional Minority Supplier Development Council's Input Committee.

55. Shellee Davis makes no claim for *past broadcast experience*. But since she is of American-Afro decent she claims qualitative *minority comparative* enhancement. Ms. Davis will install *auxiliary power* generators at her station.

56. *Ohio Radio Associates*. ORA does not propose to integrate its owners into the day-to-day management of its station, and does not claim any *quantitative credit* for integration.

57. Since it makes no quantitative claim, it will receive no *local residence* credit, no *civic participation* credit, no *broadcast experience* credit, and no *minority enhancement*. ORA will, however, provide *auxiliary power* generating equipment at its studio and transmitter.[7]

CONCLUSIONS OF LAW

1. Five mutually-exclusive applicants remain in the running for FM Channel 280A in Westerville, Ohio: (1) David A. Ringer; (2) ASF Broadcasting Corporation; (3) Wilburn Industries, Inc.; (4) Shellee Davis; and (5) Ohio Radio Associates. We have held our hearing, and the parties have submitted their evidence under the standard comparative issue.

2. We will examine all five under the criteria set out in the *Commission's 1965 Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 as modified by subsequent Review Board and Commission decisions.

3. Our evidentiary analysis will address the Commission's two *primary* objectives; (1) selecting the applicant that will offer the greatest diffusion of control of mass communications media; and (2) selecting the applicant that will offer the best practicable service to the public.

4. *Diversification of mass media*. Neither Ringer, Wilburn, Davis nor ORA have any attributable interest in any other medium of mass communications. So none of the four suffer any diversification demerits. However, the fifth applicant ASF will be assessed a substantial (but not decisionally significant) comparative demerit under the diversification criterion.

5. Thomas J. Beauvais, who holds 75% of ASF's equity, also owns substantial interests in two nearby stations in the state of Michigan; i.e., WBTZ in Pinconning, Michigan, and WFGR(FM), Grand Rapids, Michigan. So as between Ringer, Wilburn, Davis, and ORA on the one hand, and ASF on the other hand, Ringer, Wilburn, Davis and ORA will offer the greatest diffusion of control of mass communications media. They will be accorded a substantial comparative advantage over ASF.

6. *The Best Practicable Service*. We turn now to the Commission's second primary objective. In deciding which applicant will offer the best practicable service, we will decide whether any applicant should be preferred because of the superior area and population their proposal will serve (comparative coverage); (2) we will look at the extent each will integrate their ownership into the day-to-day management of the station (Quantitative Integration); (3) We will then evaluate the attributes that each integrated owner will bring to that day-to-day management (Qualitative integration); and (4) We will consider the extent to which the quantitative and qualitative integration is enhanced by minority status.

7. In evaluating the third criterion, qualitative management, we will analyze such factors as local residence, participation in civic affairs, past education and business experience, past broadcast experience, and auxiliary power.

8. *Criterion 1: Comparative Coverage* Davis, ASF, Ringer and ORA would serve between 193,009 (48%) and 225,229 (56%) more people than Wilburn. So they are given a *very slight* preference relative to Wilburn for overall service superiority.

9. With their fourth and fifth nighttime service to 183 and 2,251 people, ORA merits a *very slight* preference over Davis, ASF and Ringer. ORA deserves a *slight* preference over Wilburn because of their overall coverage as well as their undeserved area advantage.

10. On balance, only Wilburn loses any comparative ground, and no significant amount of that.

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ing his wishes on the day-to-day station operation.

[5] Davis personally services the largest accounts. Britt, which she owns free and clear of any mortgage, had gross revenues of $1,200,000 in 1991 and $1,400,000 in 1992.

[6] The Trial Judge will credit this representation. But if there is a flaw in Davis' integration proposal this is it. It's hard to envision Ms. Davis leaving a highly-successful, unmortgaged business for a mortgaged, untried, FM operation for which she has no experience. Doubts arise when one realizes that her husband, Reginald Davis, has unsuccessfully tried to obtain FM permits twice in the past; i.e., in Indianapolis, Indiana and Upper Arlington, Ohio. Query: is Shellee Davis simply attempting to obtain an FM CP she can turn over to her husband? The Trial Judge has answered this question in the negative. There simply has been no evidence developed that would sustain the conclusion that Shellee Davis is fronting for her husband.

[7] Absent the basic disqualification of its four opponents (a condition not present here) ORA is a preordained comparative loser.

11. *Criterion 2: Quantitative Integration.* Ringer, ASF, Wilburn and Davis all claim and will be credited with 100% quantitative integration. Despite assertions to the contrary all four have demonstrated that they are *bona fide* applicants. They therefore are entitled to have their qualitative attributes fully considered in determining which applicant will offer the best practicable service to the public.

12. Only ORA suffers under this criterion. ORA has elected not to integrate any of their owners into the day-to-day management of the station. They will therefore be assigned 0% quantitative integration. And it follows, as the night to day, that they will receive no qualitative credit for local residence, civic participation, broadcast experience, and minority enhancement.[8] Stated another way, ORA's quantitative election has effectively removed it from further comparative consideration.

13. *Criterion 3: Qualitative Integration.* With ORA eliminated from any further consideration, we'll examine the qualitative attributes of Ringer, ASF, Wilburn and Davis. Turning first to the *local residence* factor, Shellee Davis not only has resided within her proposed service area since 1984, she will relocate to Westerville if her application is granted. David Ringer, Ardeth Frizzell of Wilburn, and Charles Wilburn have all continuously resided outside their proposed service area. While David Ringer and Charles Wilburn have pledged to relocate to Westerville if their application is granted, Ardeth Frizzell has made no such pledge. All-in-all Davis is entitled to a substantial local residence advantage over Ringer and Wilburn and very substantial advantage over ASF.

14. Davis' *civic participation* advantage is even stronger. She has been extremely active in civic activities in organizations within her proposed service area (see Findings 51-54 *supra.*). Neither Ringer (Finding 31 *supra.*), Ms. Frizzell (findings 40-41 *supra.*), nor Charles Wilburn (Findings 46 *supra.*) have earned any credit for civic participation.

15. *Past broadcast experience* is another matter however. Neither Shellee Davis nor Charles Wilburn can claim any past broadcast experience (Findings 46, 55 *supra.*). Ringer is entitled to some past broadcast experience, although his recent role as Treasurer of WYBZ (FM), Crooksville, Ohio is not as beneficial as his earlier vintage 1969-1972 work at WMUB (Finding 32 *supra.*).

16. Ardeth Frizzell's past broadcast experience dates back to 1973. Between 1985 and December 31, 1991, she was traffic manager, business manager, and ultimately the general manager of station WBBY in Westerville (Findings 36-39 *supra.*). This past broadcast experience in the very market under consideration here entitles ASF to a substantial comparative advantage over Wilburn and Davis, and an above average advantage over Ringer. Ringer in turn, is entitled to an average comparative advantage over Wilburn and Davis.

17. Under the qualitative integration criterion we must also look at the *auxiliary power* factor. Here again Davis, Ringer, and ASF are all entitled to a substantial comparative advantage over Wilburn. Davis, Ringer and ASF have pledged to install auxiliary power generators at both their studios and transmitters. Wilburn has made no such pledge. Accordingly they (Wilburn) will be assessed a comparative demerit vis-a-vis the other three. (Findings 33, 42, 46, and 55 *supra.*).

18. Finally, we must determine whether the quantitative and qualitative integration we have just discussed (Paras. 11-17 *supra.*) will be enhanced by *minority status.* Only one such applicant is entitled to such enhancement. Ringer, Frizzell of ASF, and Charles Wilburn are all White, non-Asian, non-Hispanics. Shellee Davis is Black and is entitled to the enhancement due that minority.

19. *The Ultimate Issue - Issue 2.* Under Issue 2 we must determine, in the light of the evidence adduced under Issue 1, which of the applications should be granted.

20. The clear comparative winner is Shellee Davis. Her significant comparative superiority over David Ringer in the areas of *local residence* and *civic participation* far outweighs the *past broadcast experience* advantage that Ringer has garnered. And when you enhance Davis' qualitative advantages with her *minority status* the end result is clear. As between Davis and Ringer, Shellee Davis will offer the best practicable service to the public.

21. Turning to ASF, note first that Ms. Davis enjoys a substantial comparative advantage over ASF under the first of the Commission's two primary objectives (Paras. 12 - 15 and 17 *supra.*). As between the two there is no question that Ms. Davis will offer the *greater diffusion of control of mass communications media.*

22. In addition, Shellee Davis' significant comparative superiority over ASF in the areas of *local residence* and *civic participation* far outweighs the *past broadcast experience* advantage that ASF's Ardell Frizzell has accrued. And when you enhance Davis' qualitative advantages with her *minority status* the end result is obvious. As between Davis and ASF, Shellee Davis will offer the best practicable service to the public. so Shellee Davis is comparatively superior to ASF on *both* the Commission's primary allocation objectives.

23. Turning to Wilburn Industries, it first must be concluded that under the *comparative coverage* criterion, Shellee Davis is entitled to a very slight preference over Wilburn. When that advantage is combined with Davis' significant comparative superiority over Wilburn in the areas of *local residence, civic participation,* and *auxiliary power,* the result is obvious. And when you enhance Davis' qualitative advantages with her *minority* status, the end result is overwhelming. As between Davis and Wilburn Industries, Shellee Davis will offer the best practicable service to the public.

24. In sum, Shellee Davis is comparatively superior to David A. Ringer, ASF Broadcasting Corp., Wilburn Industries, Inc. and Ohio Radio Associates. Since she will offer the best practicable service to the public, her application will be granted.

SO, unless an appeal is taken from this Initial Decision or the Commission reviews it on their own motion, David A. Ringer's application (BPH-911230MA), ASF Broadcasting Corporation's application (BPH-911230MB), Wilburn Industries, Inc's application (BPH-911230MC) and Ohio Radio Associates, Inc's application (BPH-911231MC) ARE DENIED; and

[8] ORA does intend to provide auxiliary power at its studio and transmitter. See Finding 57 *supra.* However, that would have no impact on the comparative decision in this case.

Shellee Davis' application (BPH-911231MA) IS GRANTED.[9]

FEDERAL COMMUNICATIONS COMMISSION

Walter C. Miller
Administrative Law Judge

[9] If exceptions aren't filed within 30 days, or the Commission doesn't review the case on its own motion, this Initial Decision will become effective 50 days after its public release. See 47 CFR 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 16, 1993

CARRIERS FILE REVISIONS TO THEIR COST ALLOCATION MANUALS

PUBLIC COMMENTS INVITED

Several local exchange carriers filed revisions to implement uniformity in their Cost Allocation Manuals (CAMs) for the separation of regulated and nonregulated costs. A Common Carrier Bureau Order released on July 1, 1993, required the carriers to file revisions on November 1, 1993 (8 FCC Rcd 4664). Listed below are the names of the carriers that filed revisions and the file number assigned to each revision.

Bell Atlantic	AAD 93-133
Cincinnati Bell Telephone Company	AAD 93-134
GTE	AAD 93-135
Nevada Bell	AAD 93-136
NYNEX Telephone Companies	AAD 93-137
Pacific Bell	AAD 93-138
Puerto Rico Telephone Company	AAD 93-139
Rochester Telephone	AAD 93-140
Southern New England Telephone Company	AAD 93-141
Southwestern Bell	AAD 93-142
United Telephone/Central Telephone Company	AAD 93-143
U S West, Inc.	AAD 93-144

In addition to the CAM uniformity revisions, United Telephone also filed changes to reflect its consolidation with Central Telephone Company.

The three companies listed below filed their CAM uniformity revisions, pursuant to the July 1, Order, on September 30, 1993. Public comment was invited on these revisions in a public notice released October 20, 1993 (DA 93-1249).

Ameritech Operating Companies	AAD 93-108
BellSouth Corporation	AAD 93-110
Lincoln Telephone	AAD 93-114

Parties may file comments on the proposed revisions to the CAMs no later than December 13, 1993. Replies should be filed by December 28, 1993. Comments should reference the applicable AAD file number listed above. A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L St., N.W., Room 812, Washington, D.C. 20554 and the International Transcription Service (ITS), 2100 M St., N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room 2000 L St., N.W., Suite 812, Washington, D.C. Copies are also available from ITS.

For further information contact Alicia Dunnigan at (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-289

In the Matter of

Palmetto Communications Company

Licensee of Station WDIX(AM)
Yadkinville, North Carolina

Order to Show Cause Why the License for Station WDIX(AM) Yadkinville, North Carolina, Should Not be Revoked

ORDER TO SHOW CAUSE AND HEARING DESIGNATION ORDER

Adopted: November 2, 1993; Released: November 17, 1993

By the Chief, Audio Services Division:

1. The Chief, Audio Service Division, Mass Media Bureau, has before him for consideration: (a) the license held by Palmetto Communications Company ("Palmetto") for Station WDIX(AM), Yadkinville, North Carolina, and (b) the results of an investigation into WDIX(AM)'s silent status.[1]

2. The Commission's records indicate that WDIX(AM) has been off the air since June 13, 1991.[2] The licensee's last request for authority to remain silent was granted through April 29, 1993 by letter, dated January 29, 1993, from the Chief, AM Branch, Audio Services Division, Mass Media Bureau. In that letter, Palmetto was advised that any future requests for authority to remain silent must be accompanied by a detailed summary of the steps being taken to return WDIX(AM) to on-air operations. No response to that letter has been received. Consequently, WDIX(AM) is off the air without authority. This fact, coupled with the fact that WDIX(AM) has been off the air for over two years supports our determination that Palmetto is in apparent violation of Section 73.1740(a)(4) of the Commission's Rules.[3] Because of the protracted period of time in which the station has been silent, and because Palmetto apparently lacks the ability and/or intent to restore WDIX(AM) to broadcast status, Palmetto is also in apparent violation of Section 73.1750 of the Commission's Rules.[4]

3. Accordingly, IT IS ORDERED, That pursuant to Section 312(a)(3) and (4) of the Communications Act of 1934, as amended, Palmetto Communications Company is DIRECTED TO SHOW CAUSE why the license for Station WDIX(AM) should not be REVOKED, at a hearing to be held at a time and location specified in a subsequent Order, upon the following issues:

(a) To determine whether Palmetto Communications Company has the capability and intent to expeditiously resume broadcast operations of WDIX(AM) consistent with the Commission's Rules.

(b) To determine whether Palmetto Communications Company has violated Sections 73.1740 and/or 73.1750 of the Commission's Rules.

(c) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether Palmetto Communications Company is qualified to be and remain the licensee of Station WDIX(AM).

4. IT IS FURTHER ORDERED, That, pursuant to Section 312(d) of the Communications Act of 1934, as amended, both the BURDEN OF PROCEEDING with the introduction of evidence and the BURDEN OF PROOF with respect to the issues specified above shall be upon the MASS MEDIA BUREAU.

5. IT IS FURTHER ORDERED, That to avail itself of the opportunity to be heard, the licensee, pursuant to Section 1.91(c) of the Commission's Rules, SHALL FILE with the Commission within thirty (30) days of the receipt of this Order a WRITTEN APPEARANCE stating that he will appear at the hearing and present evidence on the matters specified in the Order. If the licensee fails to file a

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[1] The Mass Media Bureau has been delegated authority to issue and release Show Cause Orders in cases involving silent broadcast stations. *See Debrine Communications, Inc.*, 7 FCC Rcd 2118 (1992).

[2] WDIX(AM)'s license expires on December 1, 1995. (File No. BR-880729VA, granted November 10, 1988.)

[3] Section 73.1740(a)(4) provides:

"In the event that causes beyond the control of a licensee make it impossible to adhere to the operating schedule of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, D.C. not later than the 10th day of limited or discontinued operation. During such period, the licensee shall continue to adhere to the requirements in the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30 day period, the licensee will so notify the FCC of this date. If the causes beyond the control of the licensee make it impossible to comply within the allowed period, informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary."

[4] Section 73.1750 provides:

"The licensee of each station shall notify the FCC in Washington, D.C. of permanent discontinuance of operation at least two days before operation is discontinued. Immediately after discontinuance of operation, the licensee shall forward the station license and other instruments of authorization to the FCC, Washington, D.C. for cancellation."

written appearance within the time specified, or within thirty (30) days of receipt of this Order the licensee files a written statement expressly waiving his right to a hearing, the licensee's right to a hearing SHALL BE DEEMED TO BE WAIVED. In the event the right to a hearing is waived, the Presiding Judge, or the Chief Administrative Law Judge if no Presiding Judge has been designated, SHALL TERMINATE the hearing proceeding and CERTIFY this case to the Commission in the regular course of business, and an appropriate Order shall be entered.[5]

6. IT IS FURTHER ORDERED, That, if it is determined that the hearing record does not warrant an Order revoking the license for WDIX, Yadkinville, North Carolina, it shall be determined, pursuant to Section 503(b) of the Communications Act of 1934, as amended, whether an ORDER OF FORFEITURE shall be issued against the licensee in an amount not exceeding $250,000.00 for the willful and/or repeated violation of Section 73.1740 and/or 73.1750 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That this document constitutes a NOTICE OF APPARENT LIABILITY for willful and repeated violation of Section 73.1740 and/or 73.1750 of the Commission's Rules. The Commission has determined that in every case designated for hearing involving the potential revocation of a station license, it shall, as a matter of course, include a forfeiture notice so as to maintain the fullest possible flexibility of action. Since the practice of including such forfeiture notice is a routine procedure, such inclusion here should not be viewed in any manner as suggesting or otherwise indicating what the initial or final disposition of this proceeding should be.

FEDERAL COMMUNICATIONS COMMISSION

Larry D. Eads, Chief
Audio Services Division
Mass Media Bureau

[5] The Mass Media Bureau has been delegated authority to issue Revocation Orders in cases involving silent broadcast stations. *See Radio Northwest Broadcasting Company*, 4 FCC Rcd 596, n.3 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-288

In the Matter of

Turner County Broadcasting, Inc.

Licensee of Station WNNQ(AM)
Ashburn, Georgia

Order to Show Cause Why the
License for Station WNNQ(AM)
Ashburn, Georgia Should
Not be Revoked

ORDER TO SHOW CAUSE AND HEARING DESIGNATION ORDER

Adopted: November 2, 1993; Released: November 16, 1993

By the Chief, Audio Services Division:

1. The Chief, Audio Service Division, Mass Media Bureau, has before him for consideration: (a) the license held by Turner County Broadcasting, Inc. ("Turner") for Station WNNQ(AM), Ashburn, Georgia; and (b) the results of an investigation into WNNQ(AM)'s silent status.[1]

2. The Commission's records indicate that WNNQ(AM) has been off the air since June 21, 1991.[2] The licensee's last request for authority to remain silent was granted through April 29, 1993 by letter, dated January 29, 1993, from the Chief, AM Branch, Audio Services Division, Mass Media Bureau. In that letter, Turner was advised that any future requests for authority to remain silent must be accompanied by a detailed summary of steps being taken to return WNNQ(AM) to on-air operations. By letter dated July 23, 1993, Turner was notified that WNNQ(AM) was off the air without authority and was asked to provide a detailed explanation as to why the station had not yet resumed operations. No response to either of these letters has been received. Consequently, WNNQ(AM) remains off the air without authority. This fact, coupled with the fact that WNNQ(AM) has been off the air for over two years supports our determination that Turner is in apparent violation of Section 73.1740(a)(4) of the Commission's Rules.[3] Because of the protracted period of time in which the station has been silent, and because Turner apparently lacks the ability and/or intent to restore WNNQ(AM) to broadcast status, Turner is also in apparent violation of Section 73.1750 of the Commission's Rules.[4]

3. Accordingly, IT IS ORDERED, That pursuant to Section 312(a)(3) and (4) of the Communications Act of 1934, as amended, Turner County Broadcasting, Inc. is DIRECTED TO SHOW CAUSE why the license for Station WNNQ(AM) should not be REVOKED, at a hearing to be held at a time and location specified in a subsequent Order, upon the following issues:

(a) To determine whether Turner County Broadcasting, Inc. has the capability and intent to expeditiously resume broadcast operations of WNNQ(AM) consistent with the Commission's Rules.

(b) To determine whether Turner County Broadcasting, Inc. has violated Sections 73.1740 and/or 73.1750 of the Commission's Rules.

(c) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether Turner County Broadcasting, Inc. is qualified to be and remain the licensee of Station WNNQ(AM).

4. IT IS FURTHER ORDERED, That, pursuant to Section 312(d) of the Communications Act of 1934, as amended, both the BURDEN OF PROCEEDING with the introduction of evidence and the BURDEN OF PROOF with respect to the issues specified above shall be upon the MASS MEDIA BUREAU.

5. IT IS FURTHER ORDERED, That to avail itself of the opportunity to be heard, the licensee, pursuant to Section 1.91(c) of the Commission's Rules, SHALL FILE with the Commission within thirty (30) days of the receipt of this Order a WRITTEN APPEARANCE stating that he will appear at the hearing and present evidence on the

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[1] The Mass Media Bureau has been delegated authority to issue and release Show Cause Orders in cases involving silent broadcast stations. *See Debrine Communications, Inc.*, 7 FCC Rcd 2118 (1992).

[2] WNNQ(AM)'s license expires on April 1, 1996. (File No. BR-881201UZ, granted March 22, 1989.)

[3] Section 73.1740(a)(4) provides:

"In the event that causes beyond the control of a licensee make it impossible to adhere to the operating schedule of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, D.C. not later than the 10th day of limited or discontinued operation. During such period, the licensee shall continue to adhere to the requirements in the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30 day period, the licensee will so notify the FCC of this date. If the causes beyond the control of the licensee make it impossible to comply within the allowed period, informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary."

[4] Section 73.1750 provides:

"The licensee of each station shall notify the FCC in Washington, D.C. of permanent discontinuance of operation at least two days before operation is discontinued. Immediately after discontinuance of operation, the licensee shall forward the station license and other instruments of authorization to the FCC, Washington, D.C. for cancellation."

matters specified in the Order. If the licensee fails to file a written appearance within the time specified, or within thirty (30) days of receipt of this Order the licensee files a written statement expressly waiving his right to a hearing, the licensee's right to a hearing SHALL BE DEEMED TO BE WAIVED. In the event the right to a hearing is waived, the Presiding Judge, or the Chief Administrative Law Judge if no Presiding Judge has been designated, SHALL TERMINATE the hearing proceeding and CERTIFY this case to the Commission in the regular course of business, and an appropriate Order shall be entered.[5]

6. IT IS FURTHER ORDERED, That, if it is determined that the hearing record does not warrant an Order revoking the license for WNNQ(AM), Ashburn, Georgia, it shall be determined, pursuant to Section 503(b) of the Communications Act of 1934, as amended, whether an ORDER OF FORFEITURE shall be issued against the licensee in an amount not exceeding $250,000.00 for the willful and/or repeated violation of Section 73.1740 and/or 73.1750 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That this document constitutes a NOTICE OF APPARENT LIABILITY for willful and repeated violation of Section 73.1740 and/or 73.1750 of the Commission's Rules. The Commission has determined that in every case designated for hearing involving the potential revocation of a station license, it shall, as a matter of course, include a forfeiture notice so as to maintain the fullest possible flexibility of action. Since the practice of including such forfeiture notice is a routine procedure, such inclusion here should not be viewed in any manner as suggesting or otherwise indicating what the initial or final disposition of this proceeding should be.

FEDERAL COMMUNICATIONS COMMISSION

Larry D. Eads, Chief
Audio Services Division
Mass Media Bureau

[5] The Mass Media Bureau has been delegated authority to issue Revocation Orders in cases involving silent broadcast stations. *See Radio Northwest Broadcasting Company*, 4 FCC Rcd 596, n.3 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
November 10, 1993

Released: November 18, 1993

Jorge Ortiz Murias, Esq. Re: Acct. 215SJ0006
Apartado 8720
Santurce, Puerto Rico 00910

Dear Mr. Ortiz:

This is in response to your undated letter on behalf of your client, Jean Pierre Khoury, doing business as A Touch of Gold, 500 Tanca Street, Old San Juan, Puerto Rico 00902. You requested cancellation or mitigation of the forfeiture order No. 215SJ0006 issued for operating an unlicensed radio station on 157.050 MHz. The initial amount of the forfeiture proposed in the Notice of Apparent Liability was $8,000. Based on Mr. Khoury's claim that it was a first time offense, we lowered the amount of the subsequent Forfeiture Order to $6,400.

Your letter provides no new facts or other information that was not previously considered when the forfeiture was issued. We agree that the unlicensed operation was not with malicious intent, but it was a willful act. It was not an inadvertent or accidental activation of a radio transmitter. It was done with a willful intent to communicate and, in this instance, was done to promote and expedite Mr. Khoury's business operations.

The Commission regards unlicensed radio operation as a serious violation because it can (and in this instance did) cause interference to important communications that could have safety-of-life implications.

Therefore, your request that the forfeiture be cancelled is denied. The Commission has, however, reconsidered the usual forfeiture amount for this kind of violation. *See 1993 Policy Statement, Standards for Assessing Forfeitures* 8 FCC Rcd 6215 (1993). In light of these recent changes, the amount of the forfeiture is reduced to $400.

Accordingly, your client is ORDERED to pay a forfeiture of $400. Payment should be made by check or similar instrument payable to the Federal Communications Commission. To assure proper payment credit, place the account number 215SJ0006 on the remittance and mail it to:

Federal Communications Commission

P.O. Box 73482

Chicago, Illinois 60673-7482

Sincerely,

Richard M. Smith
Chief, Field Operations Bureau

cc:
Jean Pierre Khoury
A Touch of Gold
500 Tanca Street
Old San Juan, Puerto Rico 00902

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Technology for Communications International — NAL/Acct. No. 215SF0004

222 Caspian Drive
Sunnyvale, California

ORDER

Adopted: November 9, 1993; Released: November 18, 1993

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. The Bureau has before it a Petition for Reconsideration filed by Technology for Communications International (Petitioner) pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, requesting reconsideration of the Bureau's August 5, 1992, action finding Petitioner liable for a monetary forfeiture in the amount of $1,000 for violating Section 301 of the Communications Act of 1934 as amended (the Act), 47 U.S.C. § 301. As explained below, we are affirming the monetary forfeiture penalty.

2. The appropriate amount for this forfeiture is $1,000.

II. BACKGROUND

3. Our records show that on May 7, 1992, from 11:00 a.m. to 11:30 a.m. PST, an FCC inspector from San Francisco monitored transmissions from a radio station operated by TCI. Among other channels, these transmissions included the frequency 2.263 MHz. Documentation later provided by TCI revealed that they had not been licensed to operate on 2.263 MHz.

4. On May 28, 1992, pursuant to authority delegated under Section 503(b) of (the Communications Act of 1934, 47 U.S.C. § 503(b), and Section 0.311 of the Commission's Rules, 47 C.F.R. § 0.311, the FCC's San Francisco Office issued an $8,000 Notice of Apparent Liability (NAL) to TCI for violating Section 301 of the Act. On June 29, 1992, TCI responded, acknowledging use of the frequencies in question. TCI provided evidence of authorization from the U.S. Army for use of all but one of the frequencies (2.263 MHz) which, it claimed, was a misinterpretation of the actual frequency allotted (2.063 MHz).

5. On August 5, 1992, upon review of the information supplied by Petitioner, the San Francisco Office issued a Notice of Forfeiture (NOF) reducing the fine to $1,000. In a letter December 16, 1992, TCI requested Petition for Reconsideration.

III. DISCUSSION

6. We find no merit to Petitioner's arguments. Petitioner argues that use of 2.263 MHz instead of the authorized 2.063 MHz was inadvertent, and that TCI "did not choose to violate the law." Petitioner requests dismissal of the forfeiture, asserting that the act cannot be considered willful on these grounds. The term willful means to intend to commit the act, not that the party intended to deliberately violate Commission Rules.[1] Transmission on 2.263 MHz was deliberate and not accidental, and therefore was willful.

7. Petitioner also cites the authorization for use of frequency 2.063 MHz as being illegible and thus causing the confusion regarding proper channel allocation. A copy of the facsimile to which Petitioner refers was enclosed to demonstrate its illegibility. Whether the copy received by Petitioner was legible, however, is not an issue. Even assuming that the numbers were illegible, it was incumbent upon TCI to ensure that it transmitted on the frequencies as assigned.[2]

IV. CONCLUSION

8. For the reasons stated above, we affirm the finding of liability for monetary forfeiture in the amount of $1,000. Petitioner has failed to raise any reasons requiring a reduction of the forfeiture amount. In determining the amount of forfeiture, the Commission's policy regarding forfeiture adjustments was taken into consideration, *see Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *modified in part on reconsideration*, 7 FCC Rcd 5339 (1992), *petition for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992) (*Policy Statement*). No further adjustments appear warranted.

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[1] Section 312(f)(1) of the Communications Act, which also applies to Section 503(b) (*see Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991)), provides:

> The term "willful", when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or by a treaty ratified by the United States.

H.R. Rep. No. 97-765, 97th Cong. 2nd Sess. 50-51 (1982).

[2] TCI's response to the NOF included a letter from the Department of the Army to TCI dated March 30, 1990, in which TCI received its frequency assignment authorization. The conditions set forth for frequency allocation stated that "TCI shall adhere to the frequency assignments, as stated in enclosures 1, 2, and 3, and to the instructions contained therein."

V. ORDERING CLAUSES

9. Accordingly, pursuant to Section 503(b) of the Communications Act, IT IS ORDERED that Technology for Communications International FORFEIT to the United States the sum of $1,000, for willful violation of Section 301 of the Communications Act, and Section 0.314 of the Commission's Rules.

10. IT IS FURTHER ORDERED that Technology for Communications International shall make such payment within 30 days of receipt of this Order. Payment should be made by check or money order payable to the Federal Communications Commission, attention NAL Acct. No. 215SF0004, and must be mailed to:

Federal Communications Commission

P.O. Box 73482

Chicago, Illinois 60673-7482

11. IT IS FURTHER ORDERED that the Field Operations Bureau send by Certified Mail--Return Receipt Requested-- one copy of this Order to Technology for Communications International, 222 Caspian Drive, Sunnyvale, California, 94089-1014.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
November 10, 1993

Released: November 18, 1993

Steven V. Lundgren
c/o Karr - Tuttle - Campbell
One Bellevue Center, Suite 1600
411-108th Avenue
Bellevue, WA 98004

In reply, refer to:
315FE0023

Dear Mr. Lundgren:

This is in response to your March 19, 1993, letter requesting higher level review of the forfeiture No. 315FE0023 assessed for operating an unlicensed radio station aboard your vessel THE LIMIT.

In accordance with your request, we have carefully reviewed the matter. We find no new facts that would merit reduction of the forfeiture. The intercepted transmissions were made by you from the radio aboard your boat. The radio aboard the boat was not licensed at the time of the transmissions and did not become licensed until almost two months later.

However, the Commission has recently reviewed and revised its forfeiture standards for issuance of forfeitures of this type. *See 1993 Policy Statement, Standards for Assessing Forfeitures,* 8 FCC Rcd 6215 (1993). Based on the fact that there is no record of prior violations on your part, we are reducing the forfeiture amount to $100.

You are ordered, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and Section 1.80(h) of the Commission's Rules, 47 C.F.R. § 1.80(h), to pay $100. The forfeiture should be paid by check or money order made payable to the Federal Communications Commission and sent to:

Federal Communications Commission
P O. Box 73482
Chicago, IL 60673-7482

To ensure proper credit, please place the number NAL/Acct. No. 315FE0023 on the remittance.

Sincerely,

Richard M. Smith
Chief, Field Operations Bureau

CC:
Steven V. Lundgren
3223 92nd NE
Bellevue, WA 98004

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-291

In the Matter of

Amendment of Section 76.51 of the
Commission's Rules to Include
Lawrence, Massachusetts in the
Boston - Cambridge - Worcester,
Massachusetts, Television Market

NOTICE OF PROPOSED RULE MAKING

Adopted: November 8, 1993; Released: November 18, 1993

Comment Date: December 28, 1993
Reply Comment Date: January 12, 1994

By the Chief, Mass Media Bureau:

1. Before the Commission is a petition for rule making filed April 30, 1993, and a supplement thereto filed August 16, 1993, by MFP, Inc., licensee of television station WMFP(TV), Channel 63 (Independent), Lawrence, Massachusetts ("MFP" or "Petitioner") to amend Section 76.51 of the Commission's Rules, 47 C.F.R. §76.51, to change the designation of the "Boston-Cambridge-Worcester, Massachusetts" television market to "Boston-Cambridge-Lawrence-Worcester, Massachusetts." See *Report and Order* in MM Docket No. 92-259 (Broadcast Signal Carriage Issues), 8 FCC Rcd 2965, 2977-78, n.150 (1993).

BACKGROUND

2. Section 76.51 of the Commission's Rules enumerates the top 100 television markets and the designated communities within those markets. Among other things, this market list is used to determine territorial exclusivity rights under Section 73.658(m) and helps define the scope of compulsory copyright license liability for cable operators. *See* 47 C.F.R. §76.658(m) and 17 U.S.C. §111(f). Some of the markets consist of more than one named community (a "hyphenated market"). Such "hyphenation" of a market is based on the premise that stations licensed to any of the named communities in the hyphenated market do, in fact, compete with all stations licensed to such communities. *See CATV-Non Network Agreements*, 46 FCC 2d 892, 898 (1974). Market hyphenation "helps equalize competition" where portions of the market are located beyond the Grade B contours of some stations in the area yet the stations compete for economic support. *See Cable Television Report & Order*, 36 FCC 2d 143, 176 (1972).

3. In evaluating past requests for hyphenation of a market, the Commission has considered the following factors as relevant to its examination: (1) the distance between the existing designated communities and the community proposed to be added to the designation; (2) whether cable carriage, if afforded to the subject station, would extend to areas beyond its Grade B signal coverage area; (3) the presence of a clear showing of a particularized need by the station requesting the change of market designation; and (4) an indication of benefit to the public from the proposed change. Each of these factors helps the Commission to evaluate individual market conditions consistent "with the underlying competitive purpose of the market hyphenation rule to delineate areas where stations can and do, both actually and logically, compete."[1]

4. Section 4 of the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act"),[2] which amended Section 614 of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. §614, requires the Commission to make revisions needed to update the list of top 100 television markets and their designated communities in Section 76.51 of the Commission's Rules. *See* Section 614(f) of the Act.[3] The Commission stated that where sufficient evidence has been presented tending to demonstrate commonality between the proposed community to be added to a market designation and the market as a whole, such cases will be considered under an expedited rulemaking procedure consisting of the issuance of a Notice of Proposed Rule Making based on the submitted petition.

THE PETITION

5. In its petition, MFP asserts that the current "Boston-Cambridge-Worcester" market designation contained in Section 76.51 of the Commission's Rules does not accurately reflect the reality of the area television market. It notes that Station WMFP was not operational in 1972 when the Commission adopted the Section 76.51 market listings, and hence Lawrence was not included in the Boston-Cambridge-Worcester market. It maintains, however, that WMFP is today part of the "Boston (Derry & Manchester, N.H. & Worcester, Mass.)" ADI, the sixth largest, as designated by Arbitron.[4] Moreover, MFP notes that Law-

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[1] *See, e.g., TV 14, Inc. (Rome, Ga.)*, 7 FCC Rcd 8591, 8592 (1992), *citing Major Television Markets (Fresno-Visalia, California)*, 57 RR 2d 1122, 1124 (1985). *See, also, Press Broadcasting Company, Inc.*, 8 FCC Rcd 94, 95 (1993).

[2] Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[3] In connection with the implementation of the broadcast signal carriage ("must-carry") provisions of the Cable Act, the Commission concluded that a major update of Section 76.51 was not necessary based on the record then before it. Nevertheless, the Commission did make some minor revisions to Section 76.51 of the Rules, and announced that it would consider further revisions to the list of television markets on a case-by-case basis, delegating authority to act on such petitions to the Chief, Mass Media Bureau. *See Report and Order* in MM Docket No. 92-259, *supra*, hereinafter referred to as the "*Must-Carry Order*."

[4] According to information submitted by the petitioner, in addition to Station WMFP(TV), Arbitron includes the following other commercial television stations in the subject ADI: WBZ-TV, Channel 4 (NBC); WCVB-TV, Channel 5 (ABC); WHDH-TV, Channel 7 (CBS); WFXT(TV), Channel 25 (Fox); WSBK-TV, Channel 38 (Independent); WQTV(TV), Channel 68 (Ind.), Boston; WLVI-TV, Channel 56 (Ind.), Cambridge; WUNI(TV), Channel 27 (Ind.), Worcester; silent station

rence is an integral part of the "Boston-Lawrence-Salem, MA/NH" Consolidated Metropolitan Statistical Area (CMSA) in the 1990 U. S. Census.[5]

6. The petitioner further states that although the city of Lawrence is some 25 miles north of Boston,[6] WMFP competes for audience, programming and advertising revenue in the same areas as other market stations. It notes that the station's transmitter is located in downtown Boston, and that WMFP's Grade A and Grade B contours, which fall entirely within the Boston ADI, "conform closely" with the contours of other television stations licensed to the communities in the Boston market.[7] The petitioner also states that Lawrence is within the Grade A contour of nine other stations in the market.[8] As additional evidence of the commonality of the market within which these stations compete, MFP states that it pays the same Boston market rates for programming as other area stations and, due to the close proximity of Lawrence to Boston, it cannot acquire the same syndicated programming available to more distant ADI stations at lower rates.[9] Moreover, it maintains that area media treat Boston and Lawrence as in the same television market.[10]

7. MFP contends that despite the fact that WMFP directly competes with other market stations for audience, programming and advertising, the station does not share the same access to viewers enjoyed by the other stations. Specifically, the petitioner asserts that although WMFP is entitled to carriage on cable systems in the Boston-Cambridge-Worcester ADI under the Commission's new must-carry rules,[11] the absence of Lawrence as a designated community in this hyphenated market in the Section 76.51 listings results 8 in the station being considered a "distant signal" for purposes of compulsory copyright liability if carried on certain cable systems further than 35 miles from Lawrence.[12] MFP asserts that, unlike its competitors, it would be liable for increased copyright fees as a condition of carriage of WMFP by cable operators outside the station's 35 mile zone, but well within the ADI. It contends that this places WMFP at a competitive disadvantage to stations licensed to designated communities in the Boston-Cambridge-Worcester market, all of which are "local signals" not subject to copyright liability.[13]

8. Thus, the petitioner maintains that amendment of Section 76.51 as requested is essential to equalize competition among local television stations in the subject ADI. It suggests that WMFP, while in direct competition with other area stations, will then have equal access to viewers, allowing it to offer advertisers similar access to all broadcast and cable viewers in the market. In addition, MFP asserts that amendment of the existing market will provide market-area viewers equal access to WMFP's programming, including the almost 22 hours a week of "secondary" NBC programming currently scheduled to be offered by the station and unavailable from other market stations. For these reasons, the petitioner maintains that amendment of Section 76.51 of the Rules is necessary to relieve WMFP's competitive disadvantage, and to facilitate a competitive balance within the market in which it competes in a manner consistent with existing market realities.

WHRC(TV), Channel 46 (Ind.), Norwell; and WHSH(TV), Channel 66 (Ind.), Marlborough, Massachusetts; WMUR-TV, Channel 9 (ABC), Manchester; silent station WNHT(TV), Channel 21 (Ind.), Concord; WNDS(TV), Channel 50 (Ind.), Derry; and WGOT(TV), Channel 60 (Ind.), Merrimack, New Hampshire.

[5] The petitioner states that the "Lawrence-Haverhill MA-NH" Primary Metropolitan Statistical Area (PMSA) is the second most populous PMSA (after Boston) of the six PMSAs in the Boston-Lawrence-Salem CMSA. It maintains that, in contrast, Worcester, which is further from Boston than Lawrence, is the principal community in its U.S. Census Metropolitan Statistical Area, which is not part of the Boston-Lawrence-Salem CMSA. MFP presumes Worcester is included as a community in the market as designated in Section 76.51 simply because WUNI(TV), Worcester, began operation prior to 1972 when the market list was adopted, whereas Lawrence was not included in that list because there was no station licensed to that community at that time.

[6] In this regard, MFP points out that Lawrence is closer to Boston than are Worcester or the New Hampshire communities with stations included in the subject ADI.

[7] In fact, it appears from the information submitted by the petitioner that while WMFP's signal contours resemble the same basic shape of those of most market stations, the station's service area is smaller and its signal contours are contained within the larger Grade B signal areas of those other market stations.

[8] The petitioner specifically states that Lawrence receives Grade A or better service from all the Massachusetts stations operating in the market.

[9] Section 73.658(m) of the Commission's Rules provides that no television station may acquire the exclusive rights to syndicated programming against other stations licensed to a community over 35 miles distant, unless the communities are both designated communities in a hyphenated market listed in Section 76.51 of the Rules.

[10] In this regard, the petitioner references the program guides of the Lawrence cable system and *The Boston Globe*, which list, among others, the operating Boston ADI stations.

[11] *See* Section 76.56(b) of the Commission's Rules.

[12] Stations licensed to communities specifically designated in Section 76.51 are considered local for all cable systems within the 35-mile zones of all listed communities in a given hyphenated market. The absence of Lawrence as a designated community in this market list generally results in WMFP's classification as a "distant signal" for market-area cable systems more than 35 miles from Lawrence. Moreover, we note that Section 76.58(d) of the Commission's Rules required a cable operator to notify all local television stations by May 3, 1993, that they may not be entitled to mandatory carriage on the system because such carriage may cause an increased copyright liability to the cable system. Under the provisions of Section 76.55(c)(2) of the Rules, a local commercial television station otherwise entitled to mandatory carriage need not be carried on market-area cable systems if the station is considered a "distant signal" under the copyright compulsory license (17 U.S.C. §111) and the station does not agree to indemnify the cable operator for the increased copyright liability. *See Report and Order* in MM Docket No. 92-259, 8 FCC Rcd at 2973-74.

[13] One specific example given of WMFP's competitive disadvantage is its unavailability in 12 towns served by Nashoba Cable which carries WMFP's competitors but does not carry WMFP because one, or perhaps two, of its franchise towns (Ashby and Ashburnham, Massachusetts) are outside or partly outside WMFP's 35 mile zone. While the other communities served by this cable system are well within the Lawrence 35 mile zone, including some populous towns close to Lawrence and Boston such as Belmont; amendment of Section 76.51 to add Lawrence as a designated community in this hyphenated market, Nashoba Cable could provide WMFP service to all 12 towns without incurring distant signal copyright liability.

DISCUSSION

9. Based on the facts presented, we believe that a sufficient case for redesignation of the subject market has been set forth so that this proposal should be tested through the rule making process, including the comments of interested parties. It appears from the information before us that Station WMFP(TV) and stations licensed to communities in the Boston-Cambridge-Worcester television market do compete for audiences and advertisers throughout much of the proposed combined market area, and that sufficient evidence has been presented tending to demonstrate commonality between the proposed community to be added to a market designation and the market as a whole. Moreover, Petitioner's proposal appears to be consistent with the Commission's policies regarding redesignation of a hyphenated television market.[14]

ADMINISTRATIVE MATTERS

Ex Parte Rules -- Non-Restricted Proceeding

10. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, provided they are disclosed as provided in the Commission's Rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203 and 1.1206(a).

Comment Information

11. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **December 28, 1993**, and reply comments on or before **January 12, 1994**. All relevant and timely comments will be considered before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

Initial Regulatory Flexibility Analysis

12. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because if the proposed rule amendment is promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601 (3) of the Regulatory Flexibility Act. A cable television system operators will be affected by the proposed rule amendment. The Secretary shall send a copy of this *Notice of Proposed Rule Making,* including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

Additional Information

13. For additional information on this proceeding, contact Alan E. Aronowitz, Mass Media Bureau, at (202) 652-7792 or James A. Hudgens, Office of Plans and Policy, at (202) 653-5940.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[14] Although we believe this proposal merits testing through the rulemaking process, the adjustment sought affects a particularly large television market, the nation's sixth largest. In a separate proceeding, the Commission is examining alternatives to market hyphenation to more accurately reflect the true level of competition among specific stations in a large ADI market area. *See Notice of Proposed Rulemaking* in MM Docket No. 93-290 (Newton, New Jersey and Riverhead, New York), DA 93-1349, (adopted November 4, 1993). Interested parties may wish to address the issues raised in that proceeding in relation to the instant proposal.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-19

In re Applications

TERESA G. BENNETT	File No. BPH-891109ME
SML COMMUNICATIONS, INC.	File No. BPH-891109MG

For Construction Permit for a New FM Station on Channel 229A in Ringgold, Georgia

MEMORANDUM OPINION AND ORDER

Adopted: November 5, 1993; Released: November 18, 1993

By the Review Board: MARINO (Chairman) and BLUMENTHAL. Board Member GREENE absent.

1. The Review Board has under consideration a "Joint Request for Approval of Settlement Agreement and for Dismissal of Application," filed September 14, 1993 by Teresa G. Bennett and SML Communications, Inc., the two remaining applicants for a new FM station at Ringgold. The Joint Request is accompanied by a Settlement Agreement which contemplates a grant of SML's application and the payment by SML of $105,000 to Bennett for the voluntary dismissal of her application. The Mass Media Bureau supports the grant of the Joint Request and the approval of the Settlement Agreement. *See* Bureau Comments, filed October 28, 1993.

2. The Joint Petition fully complies with the provisions of 47 USC § 311 (c) and 47 CFR § 73.3525 that govern settlement agreements. The agreement as supplemented contains declarations from the principals, setting forth reasons why the agreements are in the public interest, and stating their applications were not filed for the purpose of reaching or carrying out any settlement agreement. Additionally, Bennett has declared under penalty of perjury that the proposed payment is less than her legitimate and prudent expenses incurred in the prosecution of the application; and she has submitted documentation to support her claim. Approval of the settlement agreement will serve the public interest, both by expediting the inauguration of a new FM service in Ringgold, and by conserving the resources of the Commission and the parties.[1]

3. ACCORDINGLY, IT IS ORDERED, That the Joint Request for Approval of Settlement Agreement and for Dismissal of Application, filed on September 14, 1993, as supplemented on October 27, 1993, IS GRANTED, and the settlement agreement IS APPROVED; that the exceptions of the applicants ARE DISMISSED; that the application of SML Communications, Inc. (File No. BPH-891109MG) IS GRANTED; that the application of Teresa G. Bennett (File No. BPH-891109ME) IS DISMISSED; and that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

[1] Notwithstanding that SML timely filed a pre-designation amendment as of right specifying a new financial showing that has never been challenged, the presiding Administrative Law Judge (ALJ) specified a financial qualifications issue against SML concerning the adequacy of its original financial proposal, an issue he ultimately resolved adversely to SML. *See Initial Decision*, 8 FCC Rcd 2178 (1993). He further added a related financial misrepresentation issue, but concluded there was no record evidence that SML "ever attempted or intended to deceive the Commission regarding its financial qualification[s]." 8 FCC Rcd at 2182 ¶ 42. SML, in a brief in support of the Joint Request, and the Bureau, in its comments, are correct that the financial qualifications issue was improvidently added by the ALJ in light of the amendment, which mooted any challenge to SML's original proposal, and that, therefore, the *I.D.*'s adverse conclusion concerning SML's initial financial qualifications is no impediment to a grant of SML's application. *See Scioto Broadcasters, Limited Partnership*, 6 FCC Rcd 1893 (timely post-designation amendment as of right moots adequacy of applicant's original financial showing), *recon. dismissed*, 6 FCC Rcd 4626 (1991), *aff'd mem. sub nom. Mid-Ohio, Ltd. v. FCC*, 990 F.2d 1377 (D.C. Cir. 1993); *see also Aspen FM, Inc.*, 6 FCC Rcd 1602, 1604 n.6 (1991)(absent evidence of misrepresentation or lack of candor, amendment as of right specifying new financial proposal constitutes exception to the general doctrine that original financial plan remains relevant); *cf. Great Lakes Broadcasting, Inc.*, 6 FCC Rcd 4331 (1991), *aff'd* 8 FCC Rcd 4007 (1993)(pre-designation amendment filed as of right specifying new transmitter site moots questions concerning originally specified site). The parties report that SML has already placed on deposit sufficient funds to cover the cost of the $105,000 proposal.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
November 10, 1993

Released: November 18, 1993

Lee Williams
8258 Custer School Road
Custer, WA 98240

Re: NAL/Acct. No. 215FE0062

Dear Mr. Williams:

This is in response to your July 1 and August 26, 1992, letters requesting reconsideration of the Notice of Apparent Liability dated June 3, 1992, in the amount of $2,000 and the Notice of Forfeiture dated August 19, 1992, in the amount of $1,600 for violation of the radio licensing requirements of the ship radio station aboard your vessel MONA LEE, state registration number WN4554E.

You claim that the amount of the forfeiture is unjustly high and that you would be unable to support your family if you were forced to pay such a large penalty. To support your inability to pay you furnished copies of your federal income tax returns for 1990 and 1991.

We have reviewed the material you submitted and agree that a forfeiture of the above magnitude would unduly impact your financial security. Nevertheless, unlicensed radio operation is a serious violation that cannot be disregarded or overlooked. Although we sent you a letter dated September 23, 1991, warning you of the penalties for continued unlicensed operation, our licensing records fail to confirm that you have applied for or obtained a station license for the radio aboard the MONA LEE. We expect you to take all necessary steps to avoid any reoccurrence of the unlicensed operation of the radio station aboard your vessel.

In response to your claimed inability to pay, we are reducing the forfeiture amount to $100. You are ordered to pay $100. The forfeiture should be paid by check or money order to:

Federal Communications Commission
P.O. Box 73482
Chicago, IL 60673-7482

To ensure proper credit, please place the number NAL/Acct. No. 215FE0062 on your remittance.

Sincerely,

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 93-129

In the Matter of

800 Data Base Access Tariffs and
the 800 Service Management
System Tariff

ORDER

Adopted: November 9, 1993; Released: November 10, 1993

By the Chief, Tariff Division, Common Carrier Bureau:

1. On October 17, 1993, the Beehive Telephone Companies (Beehive) filed a pleading titled "Complaint and Petition for Relief" (October 17th Complaint) in the above-referenced docket. Beehive alleges that Bellcore and Data Base Management assessed excessive charges, over $7,000 per month, against Beehive for 800 data base Service Management System (SMS/800) fees. Beehive states that it entered approximately 10,000 800 numbers into the SMS/800 data base and that it uses them to provide intrastate 800 service from which it receives less than $1,000 per month in revenue. In that pleading, Beehive objects to the SMS/800 charges or, alternatively, asks that we allow Beehive to recover the costs from the high cost fund. On October 21, 1993, Beehive filed a second pleading in the above-referenced docket (October 21st Complaint). That pleading was titled "Complaint and Request for Emergency Order" and alleged that Bellcore's actions, as described in the October 17th Complaint, had violated Sections 201(b), 202, 203(b), 205 and 214 of the Communications Act, 47 U.S.C. §§ 201(b), 202, 203(b), 205 and 214. Additionally, the October 21st Complaint alleged that the Bell Operating Companies had violated Section 314 of the Communications Act, 47 U.S.C. § 314.

2. However, Beehive had previously filed an informal complaint with the Enforcement Division of the Common Carrier Bureau on September 9, 1993. It alleged the same facts as these two other pleadings. That informal complaint is currently pending.

3. Since Beehive had previously chosen to file an informal complaint concerning this matter under Section 208 of the Communications Act, 47 U.S.C. §208, its October 17 Complaint and its October 21 Complaint are redundant. Since this is a dispute between two private parties, it is more appropriate to resolve it through the complaint process rather than in the general investigation of the SMS/800 tariff that is being conducted in CC Docket 93-129. We have already instituted a general investigation of the SMS/800 tariff in the above-referenced docket. Beehive's statutory arguments contain allegations that the SMS/800 administrator is taking actions that are inconsistent with the tariff. Such issues are more appropriately dealt with in the complaint process and would not properly be included in our investigation of the rates and terms and conditions of the SMS/800 tariff.

3. Accordingly, IT IS ORDERED that the October 17th Complaint and the October 21st Complaint filed by the Beehive Telephone Companies ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BellSouth
Telecommunications, Inc. Transmittal No. 147
Revisions to Tariff F.C.C. No. 1

MEMORANDUM OPINION AND ORDER

Adopted: November 9, 1993; Released: November 9, 1993

By the Chief, Tariff Division, Common Carrier Bureau:

1. On September 28, 1993, BellSouth Telecommunications, Inc. (BellSouth) filed Transmittal No. 147 to provide Transactions Capabilities Application Part (TCAP) service. Transmittal 147 is scheduled to take effect on November 12, 1993, on 45 days' notice. MCI Telecommunications Corporation (MCI) filed a petition to reject or suspend and investigate Transmittal 147, and BellSouth filed an opposition to MCI's petition.

2. BellSouth describes TCAP as an optional feature associated with common channel signalling (CCS) access service which would enable wireless service providers to transport database queries and responses over the CCS network. BellSouth Transmittal No. 147, Description and Justification (D&J) at 2-3. It explains that TCAP messages are routed by using originating point codes and destination point codes, which are included in the TCAP message. *Id.* at 2. BellSouth plans to charge wireless service providers a $40.00 nonrecurring charge (NRC) for the first originating point code and an $8.00 NRC for each destination point code established by each provider, and an $8.00 NRC for each additional point code. *Id.* at 4. It does not intend to impose any recurring charges for TCAP service. *Id.* at 5.

3. MCI argues that there is no difference between establishing point codes for TCAP service and establishing point codes for other SS7-related services, such as Line Information Data Base (LIDB) service. It also contends that establishing a rate applicable only to wireless providers is unreasonably discriminatory. MCI Petition at 3-4. MCI also asserts that the time estimated by BellSouth for establishing a TCAP point code is half the time estimated by BellSouth to establish a LIDB point code in its LIDB filing. *Id.* at 5-6.

4. BellSouth replies that establishing TCAP point codes takes less time than establishing LIDB point codes. According to BellSouth, LIDB point code establishment requires the provision of screening and routing information at the regional signal transfer point (STP)[1] and at the signal control point (SCP),[2] and setting up a billing account for recurring LIDB rates. BellSouth Opposition at 2-3. BellSouth claims that, for its TCAP service, screening and routing information is provided only at the local STP, because TCAP service does not entail queries of its own database or billing for recurring rates. *Id.* at 3.

5. The Common Carrier Bureau has reviewed the BellSouth transmittal, MCI's petition, and BellSouth's reply. We conclude that no compelling argument has been presented that the tariff is patently unlawful so as to warrant rejection or that an investigation is warranted at this time.

6. Accordingly, IT IS ORDERED that the petition for rejection or suspension and investigation filed by MCI Telecommunications Corporation, against BellSouth Telecommunications, Inc., Tariff F.C.C. No. 1, Transmittal No. 147, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] An STP is a packet switch designed to route SS7 messages.
[2] An SCP is a database which stores information accessible through the SS7 network. LIDB and the 800 database are examples of services supported by SCPs.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re the Applications of

GENERAL TELEPHONE
COMPANY OF CALIFORNIA

For authority pursuant to Section 214 of the Communications Act of 1934 and Sections 63.01 and 63.57 of the Commission's rules and regulations to construct and maintain broadband transport facilities in Cerritos, California; — File No. W-P-C-5927

and

For authority pursuant to Section 214 of the Communications Act of 1934 and Section 63.01 of the Commission's rules and regulations to construct, operate and maintain broadband transport fiber optic facilities in Cerritos, California — File No. W-P-C-6250

MEMORANDUM OPINION AND ORDER ON REMAND

Adopted: October 15, 1993; Released: November 9, 1993

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we revisit our grant of a temporary, conditional waiver of our telephone company/cable television cross-ownership rules to GTE California Incorporated ("GTECA") in connection with GTECA's participation in a cable television experiment in Cerritos, California.[1] This action is taken in response to the decision of the United States Court of Appeals for the District of Columbia Circuit, which remanded the *Cerritos Order* to the Commission for further consideration.[2] On remand, we find that waiver of the cross-ownership rules is not justified under the standard enunciated by the court. We therefore rescind the original rule waiver in its entirety, as well as associated grants of Section 214 authority, effective 120 days from the date this decision is released. We also direct GTECA to come into compliance with the telephone company/cable television cross-ownership prohibition within 120 days.

II. BACKGROUND

2. The telephone company/cable television cross-ownership prohibition is contained in the Communications Act of 1934 and the Commission's rules. Specifically, Section 613(b)(1) of the Communications Act of 1934, as amended by the Cable Communications Policy Act of 1984, makes it unlawful for a common carrier such as GTECA, absent waiver, "to provide video programming directly to subscribers in its telephone service area, either directly or indirectly through an affiliate owned by, operated by, controlled by or under common control with the common carrier."[3] Congress modeled the statutory ban after preexisting cross-ownership rules promulgated by the Commission in 1970. The cross-ownership prohibition prescribed in the Commission's rules, however, is more restrictive than the statute. Section 63.54 of the rules bars "any financial or business relationship whatsoever by contract or otherwise, directly or indirectly between the carrier and the customer, except only the carrier-user relationship."[4]

3. Against this legal backdrop, in the *Cerritos Order* we considered GTECA's applications for authority pursuant to Section 214 of the Communications Act[5] to construct, operate and maintain coaxial and fiber optic cable television transmission facilities in Cerritos for the benefit of Apollo Cablevision ("Apollo"), the franchised cable operator in that city. GTECA proposed to build coaxial facilities to connect Apollo's headend cable television facilities

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[1] *See General Telephone Company of California*, 4 FCC Rcd 5693 (1989) (*"Cerritos Order"*). As reflected in the caption to this proceeding, GTE California Incorporated formerly was called General Telephone Company of California.

[2] *National Cable Television Ass'n. v. FCC, as amended on denial of rehearing and rehearing en banc*, 914 F.2d 285 (D.C. Cir. 1990) (*"NCTA"*) .

[3] 47 U.S.C. § 533(b)(1). In a lawsuit brought by subsidiaries of Bell Atlantic Corporation, the U.S. District Court for the Eastern District of Virginia recently declared 47 U.S.C. § 533(b) unconstitutional. *Chesapeake and Potomac Telephone Co. of Virginia v. U.S.*, No. 92-1751-A (E.D. Va. Aug. 24, 1993). The court subsequently clarified that its August 24, 1993, order applied only to Bell Atlantic Corporation and certain specified Bell Atlantic subsidiaries and denied motions to intervene filed by numerous other telephone companies, including GTE Service Corporation, Contel of Virginia, Inc. and GTE Vantage, Inc. *Id.*, Order and Amended Final Order (Oct. 7, 1993). We find that nothing in the court's decision precludes us from taking the action herein.

[4] 47 C.F.R. § 63.54(c) (1992), *formerly codified at* 47 C.F.R. § 63.54, Note 1(a) (1991). The Commission amended Section 63.54 in 1992 to permit local exchange carriers to participate in the video marketplace through "video dialtone," but otherwise retained the "carrier-user" limitation. *See Telephone Company-Cable Television Cross-Ownership Rules, Sections 64.54 - 63.58, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking*, 7 FCC Rcd 5781 (1992) (*" Video Dialtone Order"*) , *petitions for recon. pending, petitions for review docketed sub nom. Mankato Citizens Telephone Co. et al. v. FCC*, No. 92-1404 (D.C. Cir. filed Sept. 9, 1992).

[5] 47 U.S.C § 214.

with Apollo's customers throughout Cerritos. Under the proposal, Apollo would utilize one-half of the coaxial capacity. GTECA's affiliate, GTE Service Corporation ("GTESC"), would lease the other half of the coaxial capacity, as well as the entire capacity of the fiber optic facilities, in order to conduct extensive comparative tests of the transmission of video, data and voice signals on coaxial and fiber optic facilities. As part of its technical and market testing activities, GTECA proposed to offer a service described as "near" video-on-demand over the coaxial system[6] and "pure" video-on-demand over the fiber optic facilities.[7] In addition, GTECA stated its intention to test an assortment of network configurations, and individually and comparatively evaluate broadband and narrowband services, broadband technologies, network architectures and operations, administration and maintenance concepts, and specially designed equipment.[8]

4. GTECA's Section 214 applications described certain relationships and proposed certain activities that, in two distinct respects, were inconsistent with the telephone company/cable television cross-ownership prohibition. First, GTECA had contracted with Apollo's corporate parent, T.L. Robak, to design and build the transmission facilities for the Cerritos project. As the court recognized, the business relationship between GTECA and Robak created an imputed affiliation between GTECA and Apollo which exceeded the carrier-user limitation contained in the Commission's rules. [9] Second, GTECA's proposal to engage in technical and market testing activities including the provision of video-on-demand, through its affiliate GTESC in cooperation with Apollo, exceeded the carrier-user limitation in the rules and potentially could have involved GTECA in the provision of video programming within its telephone service area. These activities, like the affiliation arising between GTECA and Apollo as a result of the GTECA-Robak business relationship, are proscribed by the cross-ownership restriction in the absence of a waiver.[10]

5. Accordingly, we considered whether a waiver of the cross-ownership restriction was justified in these circumstances. We concluded that there was good cause to grant a waiver based on the technological and marketing innovation offered by the project. We determined that the potential benefits to consumers from GTECA's technical and market trials outweighed the potential for anticompetitive effects that the telephone company/cable television cross-ownership restriction was designed to prevent. We therefore waived our cross-ownership rules to enable GTECA to exceed the carrier-user limitation with Apollo, subject to certain conditions to minimize the possibility of anticompetitive impact.[11] In conjunction with this limited rule waiver, we granted GTECA's applications for authority under Section 214 to construct, operate and maintain the Cerritos system on behalf of Apollo. This authorization encompassed GTECA's proposal to establish an optical fiber/coaxial cable experimental "test bed" to engage in a comparative technical and market analysis on a wide range of transmission services.

6. The National Cable Television Association sought judicial review of the Commission's waiver decision. On review, the court held that the Commission had not adequately justified the need for a waiver of the cross-ownership restriction and remanded the *Cerritos Order* "for further appropriate proceedings."[12] Although the court endorsed the Commission's determination that the Cerritos project held the promise of significant public interest benefits for consumers,[13] it nevertheless found that the Commission had not justified Robak's participation in the design and construction of the system and the affiliation between GTECA and Apollo which arose as a result of the GTECA-Robak business relationship:

> The Commission, however, has failed in its obligation to explain why the advantages to be derived from General's application cannot be realized in the absence of a waiver, because it has not indicated why the use of Robak for design and construction was necessary to the proposal. Obviously, absent such a reason, the choice of another unrelated contractor would have eliminated the General-Apollo affiliation and, with it, the cross-ownership problem.[14]

On the basis of its conclusion that the cross-ownership issue arose solely because of Robak's involvement, the court remanded the case for further explanation concerning whether Robak's participation was, in fact, "necessary" or "essential" to the success of the project so as to justify a waiver.[15]

7. After working informally with the parties to this proceeding for approximately a year and a half in an effort to reach a settlement of the dispute, it became apparent that further settlement negotiations would be fruitless. There-

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[6] The "near" video-on-demand service enables customers to choose a program at intervals of 15-30 minutes using up to 30 channels. GTECA planned to offer this service with the benefit of certain newly developed technological features such as a specially developed computerized control system for its video cassette recorders and customized headend encoding and subscriber decoding equipment.

[7] "Pure" video-on-demand service offers point-to-point distribution and telemetric control of programming to particular customers. Since this service has access to the full bandwidth of the optical fiber facility, it offers far greater service capacity than near video-on-demand over coaxial cable.

[8] *See Cerritos Order,* 4 FCC Rcd at 5693-94 (paras. 4-7), 5699-5700 (paras. 44-49).

[9] *NCTA,* 914 F.2d at 289.

[10] *See Cerritos Order,* 4 FCC Rcd at 5697 (para. 32), 5700, (para. 53 & n.56).

[11] The waiver was limited to five years, authorized GTECA to provide service only in the City of Cerritos, required GTECA to contract with another entity to provide video programming, and was subject to specified accounting and reporting requirements. *Cerritos Order,* 4 FCC Rcd at 5700 (paras. 50-55). We required GTECA to contract with a third-party programmer "in order to tailor a waiver no broader than necessary" to achieve the public interest goals of the project. *Id.* (para. 53). This condition was imposed to obviate concerns that GTECA might become involved in the provision of video programming directly to subscribers in its telephone service area, activity proscribed both by the statute and our rules in the absence of a waiver.

[12] *NCTA,* 914 F.2d at 290.

[13] *See id,* 914 F.2d at 289 ("[Commission's] estimate of the potential benefits to cable television customers is amply supported by the record."); *id.,* 914 F.2d at 286 (court generally agreed that "the Commission adequately showed that the potential benefits were significant... .").

[14] *Id.,* 914 F.2d at 289.

[15] *Id.*

fore, we released an *Order* seeking comment from the parties as to how the Commission should proceed on remand in light of the court's decision.[16] Specifically, we sought comment on the status of the business relationship between GTECA and Robak and the extent of Robak's continuing involvement in the Cerritos project. A list of parties filing comments and reply comments in response to the *Order* is attached as an appendix.

III. DISCUSSION

A. Legal Framework Governing Waiver of the Cross-Ownership Ban

8. Section 613(b)(4) of the Communications Act authorizes the Commission to waive the statutory cross-ownership prohibition under either of two independent criteria. First, the Commission may waive the restriction when it determines that "the provision of video programming directly to subscribers through a cable system demonstrably could not exist [within the carrier's telephone service area] except through a cable system owned by, operated by, controlled by, or affiliated with the common carrier involved."[17] Alternatively, the Commission may grant a waiver "upon other showing of good cause...."[18] Section 613(b)(4) further provides that "[a]ny such waiver shall be made in accordance with section 63.56 of title 47, Code of Federal Regulations (as in effect September 20, 1984) and shall be granted by the Commission upon a finding that the issuance of such a waiver is justified by the particular circumstances demonstrated by the petitioner, taking into account the policy of this subsection."[19] This section thus codified the Commission's pre-existing rule concerning waivers of the cross-ownership prohibition, which, as the court explained, "allow[s] waivers either (1) because otherwise cable service could not exist in the area to be served or (2) because of other good cause.[20]

9. In the *Cerritos Order*, we evaluated the GTECA applications under the second criterion specified in the statute and our rule: Whether "good cause" exists for granting a waiver under the particular circumstances presented by the Cerritos project, taking into account the policy of the cross-ownership prohibition.[21] The statute and its legislative history do not illuminate the standard for granting a waiver for good cause. However, the court agreed that, "in adopting the Commission's waiver rule, Congress codified the rule as it was interpreted by the Commission at the time of adoption."[22] In 1978 the Commission had clarified what it would consider justification for a waiver under the good cause criterion.[23] The Commission explained this standard again in the *Cerritos Order:*

> We stated [in 1978] that we were prepared to waive the cross-ownership restriction in specific cases on a public interest showing that demonstrated the benefits that could flow from joint operation of cable television and telephone facilities. In particular, we stated that we expected to consider, among other things, recent technological developments. Congress, in codifying our rules in the Cable Act, preserved the waiver provisions . . . and also preserved the Commission's ability to consider competing public policies that might, in a particular case, outweigh the policies underlying the cross-ownership restrictions.[24]

The court noted that the Commission's 1978 clarification was "particularly relevant" and observed that "[t]he justification offered by the Commission in the instant case comports closely with this statement of policy."[25]

10. Nevertheless, the court held that satisfaction of the Commission's 1978 policy statement was inadequate to justify a waiver unless the Commission also found that Robak's participation in the design and construction of the system was "necessary" or "essential" to the success of the project.[26] Because the *Cerritos Order* did not address the necessity of Robak's participation to the success of the project, the court remanded the case to the Commission to consider Robak's involvement and whether "the advantages to be derived from General's application[s] cannot be realized in the absence of a waiver... ."[27]

B. Waiver Analysis

11. As noted above, two independent aspects of GTECA's participation in the Cerritos project raise issues with respect to the telephone company/cable telephone cross-ownership restriction: (1) The affiliation between GTECA and Apollo arising as a result of GTECA's contract with Robak to design and build the transmission facilities for the project; and (2) GTECA's participation in technical and market testing trials, including the provision of video-on-demand, through GTESC in conjunction with Apollo.[28] The primary focus of our examination of the Cerritos

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[16] *General Telephone Company of California*, 7 FCC Rcd 4004 (1992).

[17] 47 U.S.C. § 533(b)(4). This provision is sometimes referred to as the "but for" criterion.

[18] *Id.*

[19] *Id.*

[20] *NCTA*, 914 F.2d at 286-87. *See* 47 C.F.R. § 63.56 (1992).

[21] The Common Carrier Bureau, in a staff-level decision granting the Section 214 applications, had granted GTECA a waiver of the cross-ownership rules under the so-called "but for" criterion, on the basis of its finding that, absent GTECA's proposal, cable video programming service as specified by Cerritos in its request for proposal could not exist in Cerritos. *General Telephone Company of California*, 3 FCC Rcd 2137 (Com. Car. Bur. 1988). On review, the Commission in the *Cerritos Order* vacated the Bureau's waiver based on the "but for" criterion and granted a rule waiver *de novo* under the "good cause" criterion.

[22] *NCTA*, 914 F.2d at 289.

[23] *See Revision of the Processing Policies for Waivers of the Telephone Company-Cable Television "Cross Ownership Rules"*, 69 FCC 2d 1097, 1110-11 (1978) (*"Clarification Order"*).

[24] *Cerritos Order*, 4 FCC Rcd at 5697 (para. 34) (internal footnote omitted), *citing Clarification Order*, 69 FCC 2d at 1111.

[25] *NCTA*, 914 F.2d at 289.

[26] *Id.*

[27] *Id.*

[28] The record supports a finding that GTECA's ongoing collaboration with Apollo in technical and market trials creates a need for a waiver of the carrier-user limitation specified in the rules independent of any affiliation between GTECA and Apollo arising as a result of the GTECA-Robak business relationship. *See, e.g.*, GTECA Comments at 5 ("Robak Construction's participation was not determinative as to the original Cerritos waiver grant, and does not drive the need for the waiver today"); *id.* at 13-18; GTECA Reply Comments at 4-5; City of Cerritos Comments at 11-12; NCTA Comments at 3, 10; NCTA Reply Comments at 8-9, 11.

proposal was on the second aspect of the proposal, *i.e.*, the experimental purposes of the coaxial and fiber optic systems and the potential public interest benefits that could accrue from GTECA's participation in technical and marketing tests.[29] We did not specifically address Robak's involvement in the project, although our temporary, conditional rule waiver for good cause encompassed the "entire Cerritos project"[30] and necessarily included the design and construction of the system. Consistent with the court's direction, we now examine Robak's participation in light of the standard articulated in the *NCTA* decision.

12. Under the court's holding, the decisive question is whether Robak's participation in the design and construction of the system was "necessary" or "essential" to the success of the Cerritos project so as to justify a waiver.[31] In their supplemental comments, the City of Cerritos and GTECA maintain that the record supports an affirmative finding on this question. For example, the City of Cerritos states that in its view Robak's special expertise in constructing underground facilities necessitated its involvement in the Cerritos project. The City notes that its local law requires that all telecommunications system plant be placed underground. In light of this requirement, and on the basis of the recommendation of its consultant,[32] Robak's reputation as a leader in the field of underground construction, and the City's determination that what ultimately evolved into the Apollo/GTECA arrangement most closely satisfied its needs, the City maintains that Robak's participation was "necessary" or "essential" to the project.[33] Similarly, GTECA emphasizes in its comments the City's view that Robak's construction efforts were necessary to the success of the project."[34] In contrast, the National Cable Television Association ("NCTA") and the California Cable Television Association ("CCTA") argue that the record does not demonstrate that other contractors could not successfully have built the system.[35]

13. After reviewing the record, including the supplemental comments submitted by the parties on remand, we are unable to conclude that Robak's participation was "necessary" or "essential" to the success of the project. The statements of the City of Cerritos and GTECA fall short of the showing required by the court's standard. The City's assertion that Robak was necessary to the success of its objectives is not determinative under the court's test. While Robak's participation may have been desirable or preferable from the City's perspective, the record does not demonstrate as a factual matter that it was necessary or essential for GTECA to contract with Robak -- rather than some other entity unaffiliated with Apollo -- to build the system. Underground construction of telecommunications facilities is not uncommon. Firms other than Robak, including, presumably, GTECA itself, have expertise and experience in this area. Unlike Robak, such firms could have participated without raising the cross-ownership concerns that Robak's involvement raised. On the basis of the record before us, we simply are unable to find that Robak's participation satisfies the controlling standard as articulated by the court. We conclude that a waiver of the rules permitting Robak's involvement is not justified.[36]

C. Action on Remand

14. In light of this conclusion, we must now determine what action on remand is appropriate in these circumstances. Commenters opposing the waiver contend that the Commission must rescind the waiver and "remedy its ill effects,"[37] by requiring GTECA to divest the Cerritos facilities[38] or by removing Apollo as the franchised cable operator in Cerritos.[39] In NCTA's view, the fact that Robak's involvement in the project has ended does not change the analysis.[40] NCTA maintains that permitting Apollo to continue operations in these circumstances would allow telephone companies to subsidize potential cable lessees through such inducements as "favorable construction contracts, low-interest loans or other unregulated non-carrier arrangements," knowing that by the time any complaint was resolved the prohibited affiliation would be extinguished.[41] Moreover, according to waiver opponents, the fact that GTECA also needs waivers for other aspects of the Cerritos project does not alleviate the need independently to justify the GTECA-Apollo affiliation arising as a result of the GTECA-Robak contractual relationship. If no rational basis exists for waiving the restriction with respect to the GTECA-Robak business relationship, these parties maintain, the Commission must rescind and undo the waiver, even if this disrupts an otherwise permissible arrangement.[42]

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[29] *See, e.g., Cerritos Order*, 4 FCC Rcd at 5693 (para.3), 5700 (para. 50 & n.50).

[30] *Id.*, 4 FCC Rcd at 5694 (para. 8).

[31] *NCTA*, 914 F.2d at 289.

[32] The consultant noted Apollo's claim that its corporate parent, Robak, had considerable experience in underground CATV construction, as well as Robak's assertion that its "rock-saw" operations are recognized among the best in the field of undergrounding. City of Cerritos Comments at 6-7.

[33] City of Cerritos Comments at 4-9; City of Cerritos Reply Comments at 2-6.

[34] GTECA Comments at 12-13; GTECA Reply Comments at 3-4. *See also* United States Telephone Association Reply Comments at 3-5.

[35] NCTA Reply Comments at 5-8; CCTA Comments at 4-5; CCTA Reply Comments at 1-5. CCTA further argues that accepting GTECA's and Cerritos' argument -- *i.e.*, that the Robak/Apollo/GTECA affiliation was necessary because the City wanted it -- would constitute an unlawful delegation of authority to the City of the FCC's statutory duty to decide whether cross-ownership waivers are justified. CCTA Reply Comments at 3-5.

[36] The City asserts that it was acting within its purview as the local franchising authority in issuing and acting upon its Request for Proposal for cable television service in Cerritos. City of Cerritos Comments at 9 n.16; City of Cerritos Reply Comments at 5. We do not question this assertion. We simply hold that the record before us does not justify a waiver of our rules regarding the GTECA-Robak business relationship under the standard articulated by the court.

[37] NCTA Comments at 5.

[38] CCTA Comments at 10; NCTA Comments at 8.

[39] NCTA Comments at 6-8.

[40] The record indicates that construction of the Cerritos system is complete and that Robak's involvement as construction contractor has ended. GTECA Comments at 6-7 & Exhibits A, B; City of Cerritos Comments at 9.

[41] NCTA Comments at 7-8.

[42] NCTA Reply Comments at 8-13; CCTA Reply Comments at 5.

15. We agree that we are constrained to rescind the original rule waiver in its entirety, as well as associated grants of Section 214 authority, in light of the court's holding and the state of the record regarding Robak's participation in the project. We continue to adhere to our original findings, endorsed by the court, regarding the substantial public interest benefits to be gained from GTECA's participation in technical and market trials in Cerritos. It is this experimental activity, not Robak's involvement in the design and construction of the system, that is at the heart of the Cerritos project and that led us to grant GTECA the temporary, conditional rule waiver in the first instance. Nevertheless, as the waiver opponents point out, simply because one aspect of the original waiver may be justified does not relieve GTECA of its obligation to satisfy the governing legal standard with respect to all aspects of the waiver. We cannot, at this juncture, excise that portion of the waiver that is not justified (*i.e.*, the GTECA-Apollo affiliation arising as a result of the business relationship between GTECA and Robak) and affirm the remaining portion of the waiver concerning GTECA's technical and market testing activities. Accordingly, we rescind the original rule waiver in its entirety. We also rescind GTECA's associated Section 214 authorizations to operate and maintain the coaxial and fiber optic cable facilities in Cerritos.[43]

16. These rescissions shall be effective 120 days from the date this decision is released. Because immediate implementation of this decision would disrupt service to the residents of Cerritos and thereby harm the public, we find it in the public interest to make the rescissions effective in 120 days. This should allow a sufficient period of time for GTECA to make necessary adjustments to come into compliance with the carrier-user limitation contained in our rules without unnecessarily interrupting service to the citizens of Cerritos.

17. We do not mandate a specific remedy at this time, such as ordering GTECA to divest the Cerritos facilities or removing Apollo as the franchised cable operator in Cerritos as urged by waiver opponents.[44] Rather, we simply direct GTECA to take steps necessary to achieve compliance with the telephone company/cable television cross-ownership restriction within 120 days from the date this decision is released. If GTECA's proposed action in this regard requires prior approval by the Commission (*e.g.*, Section 214 certification to offer channel service or video dialtone service), GTECA must submit any necessary filings within 30 days of the release date of this decision in order to allow adequate time for public comment and Commission review. If GTECA's proposed action does not require such Commission certification, it shall inform us of this fact, and its plans, within 30 days of the release date of this decision.

IV. CONCLUSION

18. In accordance with the standard enunciated by the court, we find, based on the record before us, that Robak's participation in the design and construction of the system was not "necessary" or "essential" to the success of the Cerritos cable television project. We therefore conclude that waiver of the telephone company/cable television cross-ownership rules is not justified under the controlling judicial standard. Accordingly, we rescind GTECA's original rule waiver in its entirety, as well as associated grants of Section 214 authority, effective 120 days from the date this decision is released. We also direct GTECA to come into compliance with the telephone company/cable television cross-ownership restriction within 120 days.[45]

V. ORDERING CLAUSES

19. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), that the temporary, conditional rule waiver and associated Section 214 authorizations granted in the *Memorandum Opinion, Order and Authorization*, 4 FCC Rcd 5693 (1989), ARE RESCINDED, effective 120 days from the date this decision is released.

20. IT IS FURTHER ORDERED, that GTE California Incorporated SHALL COME INTO COMPLIANCE with the telephone company/cable television cross-ownership restriction within 120 days from the date this decision is released.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[43] We do not, however, find any credible evidence in the record to support NCTA's claim that GTECA's activities are inconsistent with the terms of the original rule waiver with respect to programming. *See* NCTA Comments at 10-13; NCTA Reply Comments at 16-18. In its reply comments, GTECA states that GTESC has contracted with an independent third party to program the channels consistent with the terms of the Commission's waiver order. It further states that GTESC has limited its actions regarding the video programming "to establishing experimental objectives, evaluating test results, meeting with the independent programmer to ensure a clear understanding of the experimental objectives, and setting non-content specific parameters for achieving the goals of the experiment." GTECA Reply Comments at 6 n.17. These are the types of oversight activities we contemplated when granting GTECA expanded flexibility regarding comparative testing activities and fall within the scope of the original rule waiver. *See Cerritos Order*, 4 FCC Rcd 5700 (para. 53 & n.57). Therefore, we find no basis for imposition of forfeitures against GTECA, as suggested by NCTA.

[44] NCTA does not discuss the Commission's authority to disqualify Apollo as the Cerritos cable operator. We note that the Communications Act does not expressly empower the Commission to negate a decision by the local franchising authority to issue a franchise to a particular cable television operator.

[45] Of course, our denial of a waiver here based on the facts before us does not limit our discretion to grant waivers of the telephone company/cable television cross-ownership restriction in other, different situations. *See, e.g., Time Warner Entertainment Co., L.P. and U S West Communications, Inc., Memorandum Opinion and Order*, 8 FCC Rcd 7106 (1993) (granting temporary 18 month waiver of cross-ownership prohibition to permit orderly divestment of cable systems).

APPENDIX

Parties Filing Comments and Reply Comments on Remand In Response to the Commission's *Order*, 7 FCC Rcd 4004 (1992)

Comments (filed July 14, 1992):

1. California Cable Television Association ("CCTA")
2. City of Cerritos
3. GTE California Incorporated ("GTECA")
4. National Cable Television Association, Inc. ("NCTA")

Reply Comments (filed July 24, 1992):

1. CCTA
2. City of Cerritos
3. GTECA
4. NCTA
5. United States Telephone Association ("USTA")

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 11, 1993

JOINT PETITION FOR RULEMAKING ON CABLE TELEVISION WIRING

RM No. 8380

COMMENT DATE: December 20, 1993
REPLY DATE: January 19, 1994

On July 27, 1993 the Media Access Project, the United States Telephone Association and the Citizens for a Sound Economy Foundation (Media Access Project, *et al)* jointly filed a petition requesting that the Commission initiate a proceeding to determine how cable subscribers, under Title 47 Part 76, may have access to existing cable home wiring for the delivery of competing and complementary services. To accomplish this, Media Access Project, *et al,* believes that the Commission's telephone inside wiring rules provide a reasonable model for cable television wiring.

Copies of the petition, and comments when filed, may be inspected and copied at the Commission's Reference Center, Room 239, 1919 M St., N.W., Washington, D.C. from 9:00 a.m. to 4:30 p.m. Copies are also available from ITS, INC., Room 246, 1919 M St., N.W. Washington, D.C. (202)857-3800. Comments regarding the Media Access Project, *et al,* petition may be filed on or before **December 20, 1993**. Reply comments are due by **January 19, 1994**. Comments should reference RM No. 8380 and should be sent to William F. Caton, Acting Secretary, Federal Communications Commission, 1919 M St., N.W., Washington, D.C. 20554. For general information on how to file comments, parties should contact the FCC Consumer Assistance and Information Division at (202) 632-7000. For further information, contact Robert Kimball at (202) 634-7150.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE
November 15, 1993

US WEST PETITIONS FOR PERMANENT PRICE CAP INDEX REDUCTION

Pleading Cycle Established

COMMENTS: November 30, 1993
REPLY COMMENTS: December 7, 1993

On November 5, 1993, US West Communications, Inc. (US West) filed a petition requesting authority from the Federal Communications Commission (FCC) to make a permanent reduction to its price cap indices (PCI). US West claims this reduction would represent an annual reduction of $13 million for US West from the current PCI. US West states that the purpose of this reduction is to make whole customers who have complained that they were damaged because of US West's earnings for the rate of return reporting period 1989-90 and who have settled with US West.

US West filed FCC Form 492 for the earnings period 1989-90 on September 20, 1992. Thus far sixteen carriers have filed formal complaints against US West for this period. Five of these complaints have been settled -- four of these have already been dismissed. The rest remain pending. US West states that it intends by this filing to reduce its PCI in the an amount to meet its part of the settlement agreements for 1989-90 overearnings complaints.

Interested parties may file comments regarding the US West petition no later than November 30, 1993. Reply comments may be filed no later than December 7, 1993.

An original and four copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 C.F.R. § 1.51(c). In addition, one copy of each pleading must be filed with International Transcription Services (ITS), the Commission's duplicating contractor, at its office at 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, and one copy with the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

For further information, contact Wanda M. Harris, Tariff Division, Common Carrier Bureau, (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Shinlee Corporation NAL/Acct. No.: 315LA0062
Taiwan, R.O.C.

Liability for Monetary Forfeiture

ORDER

Adopted: November 12, 1993; Released: November 19, 1993

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. The Bureau has before it a Petition for Reconsideration filed by Mr. H. W. Lee, Deputy General Manager of Shinlee Corporation (Petitioner), pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, requesting reconsideration of the Bureau's January 28, 1993, action finding Petitioner liable for a monetary forfeiture in the amount of $7,000 for violating Section 302(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 302(b) (the Act). Petitioner requests reconsideration. As explained below, we are reducing the monetary forfeiture penalty.

2. The appropriate amount for this forfeiture is $5,600.

II. BACKGROUND

3. Our records show that on November 16, 1992, an FCC inspector from the Los Angeles Office visited Shinlee Corporation's display booth at the Fall Comdex Trade Show in Las Vegas, Nevada. He observed on display the Synco CM-14WS and Synco CM-15GS monitors. These are personal computer peripherals which must be approved by the Commission prior to marketing. Under Section 2.803 of the Commission's Rules, unless a disclaimer is prominently displayed, exposing or displaying a device or product in a trade show is considered to be marketing of that device or product. 47 C.F.R. § 2.803. Even though on-the-spot orders might not be solicited or accepted, the device or product is displayed to potential distributors, retailers, or end-users for the sole purpose of acquainting them with the features of the device or product and to generate an interest in acquiring it for distribution, retail sales, or end-use consumption.

4. On December 17, 1992, pursuant to the forfeiture provisions under Section 503(b) of the Communications Act of 1934, 47 U.S.C. § 503(b), and the authority delegated under Section 0.311 of the Commission's Rules, the Los Angeles Office issued a $7,000 Notice of Apparent Liability (NAL) to Shinlee Corporation for violating Section 302(b) of the Act, 47 U.S.C. § 302(b). Shinlee Corporation failed to respond to the NAL. The Commission's Los Angeles Office issued a Forfeiture Order on January 28, 1993, for $7,000.

5. On February 20, 1993, Petitioner replied to the forfeiture order claiming that one unit was only a prototype that was not for sale and that the other unit was already approved by an authorization issued to the manufacturer, Topfly Corporation. Petitioner requested mitigation of the forfeiture because this was its first occasion of displaying products at a computer show, and it was unfamiliar with the Commission's marketing regulations.

III. DISCUSSION

6. Section 302(b) of the Communications Act prohibits the marketing of equipment capable of causing radio interference prior to grant of an equipment authorization by the Commission. As indicated above, displaying equipment at a trade show without a conspicuous disclaimer notice as specified in Section 2.803 of the Commission's Rules constitutes marketing of that equipment. No disclaimer notice accompanied the displayed equipment.

7. Petitioner's claim that no units were sold and that the prototypes were exported at the conclusion of the show is not pertinent to the fact that they were displayed in a marketing environment without the required labelling.

8. Petitioner has failed to provide justification for cancellation of the penalty for displaying non-approved equipment in a marketing environment. However, Petitioner's lack of any prior record of violation merits a reduction in the amount of the penalty.

IV. CONCLUSION

9. For the reasons cited above, we reduce the finding of liability for monetary forfeiture to $5,600. In determining the amount of forfeiture, the Commission's policy regarding forfeiture adjustments, *see 1993 Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993), was taken into consideration. No further adjustments appear warranted.

V. ORDERING CLAUSES

10. Accordingly, pursuant to Section 503(b) of the pD4P Communications Act, 47 (U.S.C. § 503(b), and Section 1.80(f) of the Commission's Rules, 47 C.F.R. § 1.80(f), IT IS ORDERED, that Shinlee Corporation FORFEIT to the United States the sum of five thousand, six hundred dollars ($5,600) for the willful violation of Section 302(b) of the Communications Act and Section 2.803 of the Commission's Rules.

11. IT IS FURTHER ORDERED that, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.80(h) of the Commission's Rules, 47 C.F.R. § 1.80(h), that such payment is due immediately upon receipt of this ORDER and that Shinlee Corporation shall make full payment within thirty (30) days of its receipt. Payment should be made by check or money order drawn on a U.S. bank and made payable[1] to the Federal Communications Commission, attention NAL Acct. 315LA0062, and must be mailed to:

[1] Petitioner may contact the Commission's Debt Collection Officer in the Billings and Collections Branch, Stop Code

Federal Communications Commission
P.O. Box 73482
Chicago, Illinois 60673-7482

12. IT IS FURTHER ORDERED that the Field Operations Bureau send by First Class Mail one additional copy of this Order to Shinlee Corporation, No. 1 Lane 89, Sec. 3 Chung-Yang Rd, Tu-Cheng, Taipei, 23603 Taiwan, Republic of China.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

1110A2, 1919 M Street, N.W., Washington, DC 20554, if it is unable to pay the full amount within the period designated above.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
November 10, 1993

Released: November 19, 1993

Myron Marder
Boat Jupiter, Inc.
22 South Water St.
New Bedford, MA 02740

In reply, refer to:
NAL/Acct. No. 215BE0001

Dear Mr. Marder:

This is in response to your letter of November 24, 1992, requesting reconsideration of the monetary forfeiture No. 215BE0001 issued to you for violating Section 301 of the Communications Act of 1934, as amended, by operating a radio station on a frequency for which you hold no license.

We have reviewed the matter as you requested. Ship radio stations may be operated only on those frequencies falling within the frequency bands on their station licenses that are listed in Part 80 of the Commission's Rules. The frequency on which you operated is not authorized for use by marine stations, and, therefore, you are not licensed to use it. In addition, the use of each listed frequency must be restricted to the type of communications permitted by the particular rule that lists the frequency. You indicate that your service representative has provided you with a list of authorized frequencies. You should be cautious about selecting frequencies from that list. Some of those listed are restricted to specific geographic areas and some are permissible for only very restricted purposes. The Commission's Rules (or extracts therefrom) should be your guide to marine frequency usage. Frequencies available for intership business and operational communications are listed in Section 80.373(c) of the Rules, a copy of which is enclosed.

Review of the documentation provided with your letter fails to disclose any new information that was not considered when the Notice of Forfeiture was issued. The radio aboard your vessel was operated on numerous occasions on a frequency outside of the bands authorized for use by ship radio stations. However, the Commission has recently reviewed and revised its standards for issuance of forfeitures of this type. *See 1993 Policy Statement, Standards for Assessing Forfeitures,* 8 FCC Rcd 6215 (1993). Based on the new standards and the fact that there is no record of prior violations on your part, we are reducing the forfeiture amount to $2,000.

Accordingly, you are ordered to pay $2,000. This amount is due immediately and must be paid within thirty (30) days of the date of receipt of this order.[1] The forfeiture should be paid by check or money order made payable to the Federal Communications Commission and sent to:

Federal Communications Commission
P.O. Box 73482
Chicago, IL 60673-7482

To ensure proper credit, please place the number NAL/Acct. No. 215BE0001 on the remittance.

Sincerely,

Richard M. Smith
Chief, Field Operations Bureau

[1] You may contact the Commission's Debt Collection Officer in the Billings and Collections Branch, Stop Code 1110A2, 1919 M Street N.W., Washington, DC 20554, if you are unable to pay the full amount within the period designated above.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TRANSWORLD COMMUNICATIONS (U.S.A.), INC. File No. I-T-C-93-159

Application for authority pursuant to Section 214 of the Communications Act of 1934, as amended, to provide international communications services between the U.S. and foreign countries

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: November 12, 1993; Released: November 19, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require authorization for Transworld Communications (U.S.A.), Inc. (Transworld) to provide the services set forth below.[1]

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-159 IS GRANTED in part and DEFERRED in part and Transworld is authorized to:

a. establish channels of communications between appropriately licensed U.S. earth stations and INTELSAT Atlantic Ocean Region (AOR) and Pacific Ocean Region (POR) satellites for the provision of INTELSAT Business Service (IBS), International Television Service and International Datanet Service between the U.S. and those countries listed in Comsat's tariffs for the respective services;

b. lease from Comsat and operate one 64-Kbps circuit (unless otherwise specified in Attachment A) between appropriately licensed U.S. earth stations and each of the countries listed in Attachment A via INTELSAT AOR and POR satellites for the provision of switched voice, private line, data, video teleconferencing;

c. establish channels of communication (one 64-kbps circuit) via the PAS-1 satellite between appropriately licensed U.S. earth stations and each of those countries listed in Attachment B which PAS is authorized to serve for the provision of private line service, including video and audio transmission services, not interconnected with the public switched network (PSN);[2]

d. establish channels of communication (one 64-kbps circuit) via the TDRS satellites operated by Columbia Communications Corporation (Columbia) between appropriately licensed U.S. earth stations and each of those countries listed in Attachment C which TDRS is authorized to serve for the provision of private line service, including video and audio transmission services, not interconnected with the PSN;[3]

3. IT IS FURTHER ORDERED that, consistent with the foregoing discussion, Transworld's request to provide service interconnected to the PSN via the PAS-1 and TDRS satellites IS DEFERRED.

4. IT IS FURTHER ORDERED that Transworld's request to provide service via Intersputnik, former Soviet domestic and Geizer satellites IS DEFERRED.

5. IT IS FURTHER ORDERED that our authorization to Transworld to provide private lines is limited to the provision of such private lines only between the United States and the countries listed in the Attachments hereto or in applicable Comsat tariffs -- that is, private lines which originate in the United States and terminate in those countries, or which originate in those countries and terminate in the United States. In addition, Transworld may not -- and Transworld's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the foreign administration affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), *Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending*.

6. IT IS FURTHER ORDERED that the applicant shall file with the Commission a copy of any operating agreements entered into with any of its correspondents within

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[1] Transworld originally requested to provide service via the Intersputnik, former Soviet domestic and the Geizer satellites in addition to the satellites referenced herein. By letter dated November 9, 1993, Transworld requested that we defer action on that part of their application.

[2] We note that Transworld has also requested authority to establish channels of communication (six 64-kbps circuits) via the PAS-1 satellite and TDRS satellites between appropriately licensed U.S. earth stations and each of those countries which PAS and Columbia are authorized to serve for the provision of communications interconnected with the PSN. Transworld's request cannot be granted in its present form since the number of circuits it requests far exceeds the 100 64-kbps equivalent circuits PAS and Columbia are authorized to interconnect with the PSN. As a result of action by INTELSAT and the Executive Branch, the Commission is considering increasing the number of circuits that may be interconnected with the PSN from 100 64-kbps circuits per system to 1,250 64-kbps circuits per satellite. We will therefore defer action on that portion of Transworld's request which seeks authority to provide service interconnected with the PSN until such time as the Commission approves an increase in the number of circuits that may be interconnected with the PSN or Transworld demonstrates a need for service to a particular location which would be consistent with the current 100 circuit limitation.

[3] *Id.*

30 days of its execution and the applicant shall otherwise comply with the filing requirements contained in § 43.51 of the Commission's Rules, 47 C.F.R. § 43.51.

7. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

8. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic, required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

9. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. § 63.15(b) for circuits provided over the INTELSAT system.

10. IT IS FURTHER ORDERED that the applicant shall file a separate Section 214 application for the use of any additional circuits over separate satellite systems.

11. IT IS FURTHER ORDERED that neither the applicant nor any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the U.S., its territories or possessions, which is denied to any other U.S. carrier by reason of any concession, contract, understanding, or working arrangement to which the applicant or any persons or companies controlling it or controlled by it is a party.

12. This order is issued pursuant to 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the public notice date of this order (*See* Section 1.4 (b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

ATTACHMENT A

INTELSAT SATELLITE CIRCUITS

Atlantic Ocean Area Regions

Latin America

Antigua	Curacao	Netherlands Ant.
* Argentina	**Dominican Republic	Nicaragua
Aruba	Ecuador	**Panama
Bahamas	**El Salvador	Paraguay
Barbados	French Guiana	Peru
Belize	Grenada	St. Lucia
Bermuda	Guantanamo Bay	St. Vincent
Bolivia	Guatemala	Surinam
* Brazil	Guyana	Trinidad & Tobago
Cayman Islands	Haiti	Turks & Caicos Isles
* Chile	Honduras	Uruguay
**Colombia	Jamaica	* Venezuela
Costa Rica	Martinique	

Europe

**Austria	**Ireland	San Marino
* Belgium	* Italy	Slovenia
Croatia	Liechtenstein	* Spain
Cyprus	Luxembourg	* Sweden
**Denmark	Malta	* Switzerland
**Finland	Monaco	Turkey
* France	* Netherlands	* United Kingdom
* Germany	**Norway	Vatican
**Greece	Portugal	Yugoslavia
Iceland		

Middle/Near East and Africa and Other Europe

Algeria	**Belarus	Canary Islands
Angola	Benin	Cape Verde
Armenia	Botswana	Central African Rep.
Ascension Isl.	Bulgaria	Chad
Azerbiajan	Burkina Faso	Congo
Azores	Burma	**Czechoslovakia
**Bahrain	Cameroon	Diego Garcia

Notes: One 1.544-Mbps circuit requested to each country marked by single *.
Six 64-Kbps circuits requested to each country marked by double **.
One 64-kbps circuit requested to each of the other countries.

ATTACHMENT A
(continued)

INTELSAT SATELLITE CIRCUITS

Middle/Near East and Africa and Other Europe (Cont'd)

**Egypt	Lesotho	Senegal
Estonia	Liberia	Sierra Leone
Ethiopia	Libya	South Africa
Gabon	Lithuania	Sri Lanka
Gambia	Madagascar	Sudan
Georgia	Malagasy Rep.	Swaziland
Ghana	Malawi	Syria
Gibraltar	Mali	Tajikistan
Guinea	Mauritania	Tanzania
**Hungary	Moldova	Togo
Iran	Morocco	Tunisia
Iraq	Mozambique	Turkmenistan
* Israel	Niger	**United Arab Emirates
Ivory Coast	Nigeria	Yemen
Jordan	Oman	Zaire
Kazakhstan	Pakistan	Zambia
Kenya	* Poland	Zimbabwe
**Kuwait	Qatar	Uganda
Kyrgyzstan	Romania	**Ukraine
Latvia	* Russian Federation	Uzbekistan
**Lebanon	* Saudi Arabia	

(B) Pacific Ocean Area Region

American Samoa	* Japan	**Philippines
* Australia	Kiribati	Ponape
Brunei	* Korea	Saipan
* China (Peoples Republic Of)	Kosrae	* Singapore
	Majuro	Solomon Is.
Christmas Is.	* Malaysia	Sri. Lanka
Cook Island	Mariana Is.	* Taiwan
Ebeye	Nauru	Thailand
Fiji Islands	New Caledonia	Tonga
French Polynesia	New Guinea	Truk
Guam	New Zealand	Vanuatu
* Hong Kong	Palau	Western Somoa
* India	Papua New Guinea	Yap
* Indonesia		

Notes: One 1.544-Mbps circuit requested to each country marked by single *.
Six 64-Kbps circuits requested to each country marked by double **.
One 64-kbps circuit requested to each of the other countries.

ATTACHMENT B

PAS-1 SATELLITE CIRCUITS

For Communications NOT INTERCONNECTED with the Public Switched Network

Ku-band Countries

Albania
Anguilla
Armenia
Austria
Azerbaijan
Bahamas
Belarus
Belgium
Bermuda
Bulgaria
British Virgin Is.
Cayman Islands
Czechoslovakia
Denmark
Estonia
France
Georgia
Germany
Greece
Hungary
Ireland
Italy
Kazakhstan
Kyrgyzstan
Latvia
Lithuania
Luxembourg
Moldova
Monaco
Montserrat
Netherlands
Poland
Portugal
Romania
Russian Federation
Spain
Sweden
Switzerland
Tajikistan
Turkmenistan
Turks & Caicos Is.
Ukraine
United Kingdom
Uzbekistan
Yugoslavia

C-band Countries

Anguilla
Antigua
Argentina
Aruba
Bahamas
Barbados
Barbuda
Belize
Bermuda
Bolivia
Brazil
British Virgin Is.
Cayman Islands
Chile
Colombia
Costa Rica
Dominica
Dominican Republic
Ecuador
Grenada
Guatemala
Guyana
Haiti
Honduras
Jamaica
Mexico
Montserrat
Netherlands Ant.
Panama
Paraguay
Peru
St. Christopher and Nevis
St. Lucia
St. Vincent and the Grenadines
Suriname
Trinidad and Tobago
Turks & Caicos Is.
Uruguay
Venezuela

ATTACHMENT C

TDRS SATELLITE CIRCUITS

Countries which TDRS is authorized to provide service NOT INTERCONNECTED to the public switched network

TDRS-41

Austria
Bahamas
Belgium
Canada
Denmark
Finland
France
Germany
Ireland
Israel
Jamaica
Liechtenstein
Luxembourg
Mexico
Netherlands
Portugal
Sweden
Switzerland
Turkey
United Kingdom

TDRS-174

Hong Kong
Mexico
Philippines

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNICATIONS SATELLITE CORPORATION — File No. CSS-90-004-LA

Application for authority to participate in the launch of the INTELSAT VII (F-1)

ORDER AND AUTHORIZATION

Adopted: November 12, 1993; Released: November 19, 1993

By the Chief, International Facilities Division:

1. The Commission has under consideration an application, File Number CSS-90-004-LA, filed by the Communications Satellite Corporation (Comsat) (now COMSAT Corporation) on May 18, 1990, and supplemented on September 6, 1990, for authority to participate in the launch, positioning and in-orbit testing of the INTELSAT VII (F-1) satellite.

2. The application appeared on the Commission's Public Notice on June 20, 1990. Comments were received by Pan American Satellite (PAS) on July 20, 1990. PAS states in its comments that it does not object to Comsat's current requests for launch authority, but asks that any actions that the Commission take be without prejudice to two pending matters that relate to the Intelsat VII procurement. The first is PAS's appeal of the Commission's February 1990 Intelsat VII procurement decision.[1] The second is PAS's complaint filed in January 1989 in which it contents that Comsat's participation in the Intelsat VII procurement prior to receiving FCC approval consititued a violation of statutes and FCC policies.[2] PAS therefore asks that the Commission take no action with respect to the instant applications that would prejudice or adversely affect the outcome of PAS's pending appeal and complaint.

3. In the application, Comsat states that the INTELSAT VII (F-1) is currently under construction at Ford Aerospace Company and is expected to be delivered on November 1, 1991. Current plans call for the launch to take place in the third quarter of 1992 on an Ariane launch vehicle. This satellite will replace the INTELSAT V-A (F-10) at 174^0 East Longitude in the Pacific Ocean Region (POR). It will serve the POR Primary role and provide international services. The INTELSAT V-A (F-10) will be moved to a residual-role, inclined-orbit location in the Atlantic Ocean Region, where it will provide cable-restoration and other inclined-orbit services.

4. The estimated costs associated with the INTELSAT VII (F-1) are as follows (all amounts in real year dollars):

FAC Contract (including delivery price, engineering changes and amendments)	$ 78.1 million
FAC Launch Support (to be determined)	$
Performance incentives, capitalized	$ 2.6 million
Performance incentives, expensed	$ 23.7 million
Support Contract	$ 3.2 million
Launch Services	$105.9 million
TOTAL INTELSAT	$213.5 million
TOTAL COMSAT (based on current ownership share of 23.9%)	$ 51.0 million

5. In view of the foregoing and the need to provide the necessary satellite facilities to meet traffic requirements, we conclude that the public interest would be served by a grant of the subject request. Accordingly, Comsat is AUTHORIZED to participate in the launch and test program of the INTELSAT VII (F-1) satellite to be positioned at 174^0 East Longitude, subject to the following terms and conditions:

(a) This authorization is limited to the described program. Any change in the authorized location due to a launch delay or other circumstances will be considered upon a proper request by Comsat for authority;

(b) Comsat shall furnish via the INTELSAT VII (F-1) only those channels of communication for commercial service which have been, or may be, authorized by the Commission under Section 214 of the Communications Act of 1934, as amended;

(c) Within 30 days after completion of the testing program, Comsat shall provide the Commission with a summary report of its results and upon request, shall make the detailed test data available;

(d) Conduct of the program authorized here shall be without interruption of commercial satellite service now authorized at U.S. earth stations;

(e) Neither this authorization nor any right granted herein shall be assigned or otherwise transferred without approval of the Commission; and

(f) Unless extended or modified for good cause, this authorization shall terminate six months after the release date of this order.

(g) This action is without prejudice to any action which may be taken in the appeal of the Commission's decision as referenced in footnote 1 above.

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for

[1] *See* Pan American Satellite v. FCC, No. 90-1134 (D.C. Cir., Filed March 12, 1990)
[2] *See* File No. E-89-87. This issue has been been resolved. *See* 8 FCC Rd 5622, Common Carrier Bureau (1993).

review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities
Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Global Cellular
Communication, Inc.

Application for authority to construct and operate a nationwide, commercial 220 MHz SMR System — Lottery ID No. 049

ORDER

Adopted: November 11, 1993; Released: November 22, 1993

By the Deputy Chief, Licensing Division:

1. On May 3, 1993 National Communications Group, Capital Communications Group, Columbia Communications Group, Lonesome Dove Communications Group, All-American Communications Partners, and Shiner Bock Group (hereinafter "petitioners") filed an informal opposition to the application of Global Cellular Communication, Inc. ("Global") for a five channel, nationwide, commercial 220 MHz SMR system. In their opposition, petitioners assert that Global failed to adequately establish its financial qualifications. For the reasons that follow, the opposition is dismissed and we will continue to process Global's application.

2. Global asserts that petitioners' opposition to its application is procedurally improper because it is not a valid petition to deny authorized by Section 309 of the Communication Act of 1934 as amended, 47 USC § 309(d)(1). Although it is established that petitions to deny do not lie against Private Land Mobile Radio Service applications,[1] Section 1.41 of our rules, 47 CFR § 1.41, allows for informal requests for agency action where the form for requesting the relief sought is not otherwise provided by the rules. An informal opposition to an application, such as this, is such a request.

3. Global also argues that petitioners request was untimely filed because the public notice on February 16, 1993 listing Global's application for inclusion in the lottery directed that objections to any applicant's qualifications be filed within thirty days of the notice. The public notice states in pertinent part:

> Additionally, pursuant to 47 C.F.R. § 1.41, any interested party may file information with the Commission that may reflect on the suitability of an applicant to be a licensee. Only allegations pertaining to applicants later granted tentative selectee status will be investigated and all allegations directed toward a given tentative selectee will be resolved prior to the issuance of a license to that tentative selectee. Corrections to the listing of applicants to be included in the lottery and information relating to the suitability of these applicants must be received by the Commission within 30 days of the publication of this Public Notice in the *Federal Register*...

The Commission published the Notice in the Federal Register on February 19, 1993 making all objections due by March 21, 1993. The Public Notice provided for the orderly filing of Section 1.41 objections, giving objecting parties assurance that their objections would be investigated and resolved prior to the grant of any licenses. Petitioner's opposition, filed May 3, 1993, is therefore dismissed as untimely.

4. We also find petitioners' objections lacking in merit. Petitioners argue that Global failed to establish its financial qualifications because it did not submit a commitment letter containing an original signature. This argument is based on the premise that the Commission adopted Common Carrier-type financial qualification standards[2] for the first time in the Private Radio arena, and the interpretations of the Common Carrier provisions and precedent for establishing financial qualifications were implicitly, if not explicitly, adopted as well. Specifically, petitioners assert that Comtech's application is fatally defective due to Common Carrier precedent requiring an original signature on a commitment letter.[3] We disagree.

5. The Commission did not give notice that it was adopting ancillary Common Carrier requirements relating to physical form of a financial commitment. Absent a Commission action explicitly adopting an original signature rule in this context, we will not imply and enforce such a rule.[4] This does not, however, mean that certain Common Carrier precedent relating to the financial commitment standard is irrelevent. Because the rules in Subpart T of Part 90 setting forth the 220 MHz financial commitment standard parallels a similar standard in Part 22 of our rules, Common Carrier precedent interpreting analogous Part 22 rules may be persuasive in interpreting the sufficiency of the financial commitment.

6. Not only did the Commission not adopt an original signature rule, but in recent years the Commission has adopted a policy which allows for the acceptance of copies of most documents in lieu of originals. For example, when parties file motions, pleadings, briefs and other documents, Section 1.52 of our Rules, 47 CFR § 1.52, provides that a copy or facsimile of a signature is acceptable, provided that

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[1] *See, e.g., In the matter of BP Oil Company et al.*, 8 FCC Rcd (Released October 13, 1993)(paragraph 8).

[2] When the Commission adopted the nationwide, commercial 220 MHz financial qualification provisions, the Commission referenced a Common Carrier lottery rule in a footnote. *Report and Order, 220 MHz Proceeding*, 6 FCC Rcd 2356, 2375 & n.109(1991) *aff'd*, 7 FCC Rcd 4484(1992) ("This constitutes adoption of a firm financial commitment standard. *See, e.g.*, 47 CFR § 22.917(c).").

[3] *See*, footnote 32 in *Report and Order, Cellular Lottery Rulemaking*, 101 FCC 2d 577, 590(1985).

[4] *See, Maxcell Telecom Plus, Inc. v FCC*, 815 F.2d 1551, 1558(D.C. Liv. 1987) (FCC must provide notice of the required content of applications that are reasonably comprehensible to men acting in good faith).

the party filing the facsimile signature retains the original. Because an original signature on a commitment letter is not otherwise required under Subpart T of Part 90, we find the policy embodied in § 1.52 to govern and will accept the copy of the commitment letter submitted by Comtech in lieu of an original.

7. Petitioners also argue that the obligation to provide financing contained in the commitment letter from Jericho State Capital Corp. ("Jericho") is illusory. Jericho included in the commitment letter the following language:

> The Lender has relied upon these representations and upon the accuracy of the submissions provided by [GCCI] and its Principals to Lender in deciding to issue this commitment, and any misstatement in any of these submissions which Lender in its sole discretion deems material will, at Lender's sole option, void this commitment.

Petitioners assert that this language allows the lender to void the commitment at will. Global counters with the argument that the commitment is only voidable after a showing of a material misstatement, and that the lender's discretion in determining what constitutes a material misstatement is limited to a good faith determination by New York law. We conclude that the Jericho commitment letter provides the type of reasonable assurance of the availability of a loan that we are seeking from applicants.[5]

8. Petitioners' other arguments address Global's qualifications in the absence of the Jericho commitment. Because we find the Jericho commitment letter sufficient, these arguments are moot.

ORDERING CLAUSE

9. For the above reasons, the petitioner's Informal Opposition To Application filed May 3, 1993 IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

W. Riley Hollingsworth
Deputy Chief, Licensing Division

[5] Even if the commitment letter did not contain the challenged language, the lender might avoid its contractual obligation on the basis that the borrower fraudulently obtained the commitment.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Comtech, Inc.

Application for authority to construct and operate a nationwide, commercial 220 MHz SMR System — Lottery ID No. 028

ORDER

Adopted: November 11, 1993; Released: November 22, 1993

By the Deputy Chief, Licensing Division:

1. On April 1, 1993, Comtech, Inc. was selected by lottery as one of four tentative selectees for a commercial, nationwide 220 MHz SMR license. On May 3, 1993, National Communications Group, Capital Communications Group, Columbia Communications Group, Lonesome Dove Communications Group, All-American Communications Partners, and Shiner Bock Group (hereinafter "petitioners") filed an informal opposition to the application of Comtech, Inc. ("Comtech") for a five channel, nationwide, commercial 220 MHz SMR system. Petitioners object to the grant of Comtech's application on the basis that Comtech failed to adequately establish its financial qualifications. By this order, we dismiss petitioners' objections because they are untimely. As part of our own review of Comtech's application, we find that Comtech did not adequately demonstrate its financial qualifications as required by 47 CFR § 90.713(a)(5). Comtech's application is defective, and in accordance with 47 CFR § 90.139, is dismissed.

2. Comtech argues that petitioners' opposition was untimely filed. The Commission, by Public Notice released February 16, 1993, listed Comtech's application for inclusion in the lottery and directed that objections to any applicant's qualifications be filed within thirty days of the notice. The public notice states in pertinent part:

> Additionally, pursuant to 47 C.F.R. § 1.41, any interested party may file information with the Commission that may reflect on the suitability of an applicant to be a licensee. Only allegations pertaining to applicants later granted tentative selectee status will be investigated and all allegations directed toward a given tentative selectee will be resolved prior to the issuance of a license to that tentative selectee. Corrections to the listing of applicants to be included in the lottery and information relating to the suitability of these applicants must be received by the Commission within 30 days of the publication of this Public Notice in the *Federal Register*...

The Commission published the Notice in the Federal Register on February 19, 1993 making all objections due by March 21, 1993. The Public Notice provided for the orderly filing of Section 1.41 objections, giving objecting parties assurance that their objections would be investigated and resolved prior to the grant of any licenses. Petitioners' opposition, filed May 3, 1993, is therefore dismissed as untimely.

3. On our own motion as part of our review of Comtech's application and its qualifications to hold a nationwide, commercial 220 MHz SMR license, we will consider several issues raised by petitioners. Petitioners argue that Comtech failed to establish its financial qualifications because it did not submit a commitment letter containing an original signature. This argument is based on the premise that the Commission adopted Common Carrier-type financial qualification standards[1] for the first time in the Private Radio arena, and the interpretations of the Common Carrier provisions and precedent for establishing financial qualifications were implicitly, if not explicitly, adopted as well. Specifically, petitioners assert that Comtech's application is fatally defective due to Common Carrier precedent requiring an original signature on a commitment letter.[2] We disagree.

4. The Commission did not give notice that it was adopting ancillary Common Carrier requirements relating to physical form of a financial commitment. Absent a Commission action explicitly adopting an original signature rule in this context, we will not imply and enforce such a rule.[3] This does not, however, mean that certain Common Carrier precedent relating to the financial commitment standard is irrelevent. Because the rules in Subpart T of Part 90 setting forth the 220 MHz financial commitment standard parallel similar rules in Part 22, Common Carrier precedent interpreting analogous Part 22 rules may be persuasive in interpreting the sufficiency of the financial commitment of a 220 MHz applicant.

5. Not only did the Commission not adopt an original signature rule, but in recent years the Commission has adopted a policy which allows for the acceptance of copies of most documents in lieu of originals. For example, when parties file motions, pleadings, briefs and other documents, Section 1.52 of our Rules, 47 CFR § 1.52, provides that a copy or facsimile of a signature is acceptable, provided that the party filing the facsimile signature retains the original. Because an original signature on a commitment letter is not otherwise required under Subpart T of Part 90, we find the policy embodied in § 1.52 to govern and will accept the copy of the commitment letter submitted by Comtech in lieu of an original.

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[1] When the Commission adopted the nationwide, commercial 220 MHz financial qualification provisions, the Commission referenced a Common Carrier lottery rule in a footnote. *Report and Order, 220 MHz Proceeding*, 6 FCC Rcd 2356, 2375 & n.109(1991) *aff'd*, 7 FCC Rcd 4484(1992) ("This constitutes adoption of a firm financial commitment standard. *See, e.g.*, 47 CFR § 22.917(c).").

[2] *See*, footnote 32 in *Report and Order, Cellular Lottery Rulemaking*, 101 FCC 2d 577, 590(1985).

[3] *See, Maxcell Telecom Plus, Inc. v FCC*, 815 F.2d 1551, 1558(D.C. Liv. 1987) (FCC must provide notice of the required content of applications that are reasonably comprehensible to men acting in good faith).

6. Petitioners also argue that the obligation to provide financing contained in the commitment letter from American National Bank is insufficient. The commitment letter is conditioned on the personal guarantees of Phillip Leavitt, Nate Dardick, and Jerry Nelson. Comtech did not submit evidence that these individuals are willing to undertake to guarantee the debts of the corporation. *See, e.g., Memorandum Opinion and Order, In re Applications of American Mobile Communications of Washington and Oregon et al., CC Docket No. 83-3,* 52 RR 2d 1520(1983) (commitment letter sufficient because evidence of personal guarantees required by bank was included). The letter also lacked an explanation of the individuals' relationships to the applicant if any. *See, Fourth Report and Order, In re Amendment of the Commission's Rules for Rural Cellular Service* 4 FCC Rcd 2542, 2547(1988)(Paragraph 27) (commitment letters cannot be conditioned on the guarantee of the loan by entities other than the applicant). For these reasons, we find that this commitment letter is insufficient evidence that the face amount of $1.8 million is available for Comtech's use.

7. Further, this amount, $1.8 million, appears to fall short of the amount necessary to construct 40 percent of its system and operate it for four years as required by the Commission. Comtech's own estimates reveal that this amount is only sufficient to construct 40 percent of its system and operate it for two years. Comtech admits it failed to address the Commission's requirement that it demonstrate the availability of financial resources to operate for four years. While Comtech attempts to argue that the Commission only required sufficient assets to construct forty percent of its system and that it intends to do so in two years, the Commission was explicit when it established the requirement: each applicant must demonstrate the financial ability to construct forty percent of its system *and* operate the system for four years. *Report and Order, 220 MHz Proceeding,* 6 FCC Rcd 2356, 2375 (1991). Comtech admittedly failed to demonstrate the latter prong of this requirement.

ORDERING CLAUSE

8. For the above reasons, Comtech, Inc.'s application for a commercial, nationwide 220 MHz SMR license IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

W. Riley Hollingsworth
Deputy Chief, Licensing Division

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-54

In re Applications of

GAF BROADCASTING COMPANY, INC. — File No. BRH-910201WL

For Renewal of License of
Station WNCN(FM) (104.3 MHz)
New York, New York

CLASS ENTERTAINMENT AND COMMUNICATIONS, L.P. — File No. BPH-910430ME

For a Construction Permit for a New
FM Station, Channel 104.3 MHz
New York, New York

MEMORANDUM OPINION AND ORDER

Adopted: November 10, 1993; Released: November 23, 1993

By the Review Board: MARINO (Chairman), BLUMENTHAL, and GREENE.

1. The Review Board has before it for consideration an appeal filed October 18, 1993 by Listeners' Guild, Inc. (Guild) from the *Memorandum Opinion and Order*, FCC 93M-593, released September 17, 1993 (*Order*), of Administrative Law Judge Joseph Chachkin (ALJ), which granted the license renewal application of GAF Broadcasting Company, Inc. (GAF) and terminated the proceeding. On October 8, 1993, Guild also filed with the Board a petition for intervention and a motion to enlarge issues. GAF and the Mass Media Bureau filed oppositions to these pleadings on October 20, October 27, and November 1, 1993.

2. In a recent *Memorandum Opinion and Order, GAF Broadcasting Co., Inc.*, 8 FCC Rcd 6678 (Rev. Bd. 1993), the Board rejected Guild's appeal from the ALJ's ruling denying Guild's earlier petition for intervention and motion to enlarge issues in this proceeding. As we indicated there, the Commission has twice ruled that Guild is not entitled to party status at this time. *Id.* at 6678-79. We further noted that should EEO issues ultimately be specified based on Guild's allegations, it could participate at the hearing on that basis. *Id.* In the *Order* now under appeal, the ALJ granted the motion of Class Entertainment and Communications, L.P., the only competing applicant, for dismissal of its application, and, in the absence of any basic qualifying issues extant against GAF, granted its application conditioned on final Commission disposition of the still-pending EEO allegations.

3. Guild's present appeal is simply premised on its continuing objection to the prior rulings denying it party status and refusing to designate for hearing issues it had requested. Appellant notes that it is seeking review of these earlier rulings before the Commission and the court of appeals, and that its instant appeal preserves its objections to the ALJ's *Order* should its other filings be granted. In its latest petition for intervention, Guild asserts that its long history of involvement in representing listeners of WNCN(FM) and its familiarity with its operations and licensee qualify it to participate in adducing evidence on the proposed issues raised in its accompanying motion to enlarge. In that motion, Guild requests that issues of age discrimination and securities fraud should be added against GAF based on allegations contained in a complaint filed in the Superior Court of New Jersey against GAF by a former employee of the station. Guild notes that it previously raised related age discrimination and securities fraud issues which were denied and that there may be a continuing pattern of illegal conduct. Finally, Guild requests a 47 CFR 1.65 issue based on GAF's alleged failure to timely report the New Jersey complaint to the Commission.

4. Guild's assorted requests are unauthorized, repetitive, and frivolous, and will be denied as such. As Guild itself acknowledges (Appeal at p. 2), 47 CFR 1.302(a) provides that only a "party to the proceeding" may appeal an ALJ ruling terminating a hearing proceeding, and Guild has not achieved this status. The same infirmity forecloses its motion to enlarge which also may be filed only by a "party to a hearing." 47 CFR 1.229(a). Beyond these difficulties, moreover, Guild's appeal asserts no substantive error in the ALJ's *Order* but merely seeks to preserve its objections to GAF's stewardship of WNCN(FM) in the hope that its previously-denied requests will ultimately be granted. As Guild must recognize, however, these matters are beyond the Board's jurisdiction in that they now pend before the Commission or the court. Likewise, Guild's new attempt to intervene at this late date finds no support in 47 CFR 1.223, which governs such requests, but is tied strictly to its latest motion to enlarge. That motion, filed after the hearing is over and the proceeding terminated, not only fails to meet the Commission's stringent procedural standards for reopening the record, *see Eve Ackerman*, 8 FCC Rcd 4205 (1993), but insofar as it is predicated on allegations made in a lawsuit filed in a New Jersey state court, also is not based on a final adjudication of which the Commission can take cognizance. *See Character Qualifications*, 102 FCC 2d 1179, 1204-05 (1986), *modified*, 5 FCC Rcd 3252 (1990), *recon. denied*, 6 FCC Rcd 3448 (1991); *Shareholders of GAF Corp.*, 7 FCC Rcd 3225, 3227-28 (1992). Finally, Guild's request for a reporting issue is equally deficient in that it is unaccompanied by a *prima facie* showing that the unreported information is of decisional significance, the subject of deliberate concealment, or part of a pattern of violations. *See Goodlettsville Broadcasting Co., Inc.*, 8 FCC Rcd 5178, 5181 (1993); *Merrimack Valley Broadcasting*, 99 FCC 2d 680, 683 n.9 (1984). In any event, in its most recent policy enunciation regarding character qualifications in broadcast licensing, the Commission stated that it would no longer require applicants to even report pending litigation involving relevant non-FCC misconduct until there is an adjudication. *Character Qualifications*, 7 FCC Rcd 6564, 6566 (1992).

5. ACCORDINGLY, IT IS ORDERED, That the Appeal filed October 18, 1993, the Petition for Intervention filed October 8, 1993, and the Motion to Enlarge Issues filed October 8, 1993, by Listeners' Guild, Inc. ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

New England Radio Corporation — File Nos. BR-901203VD, BRH-901203UH

For Renewal of License of
Stations WHYN(AM)/WHYN-FM
Springfield, Massachusetts

MEMORANDUM OPINION AND ORDER AND NOTICE OF APPARENT LIABILITY

Adopted: November 3, 1993; Released: November 5, 1993

By the Commission: Chairman Quello dissenting and issuing a statement.

I. INTRODUCTION

1. The Commission has before it for consideration: (i) license renewal applications for the two captioned radio stations; (ii) a Petition to Deny timely filed on March 1, 1991, by the New England State Conference of Branches of the NAACP, the Connecticut State Conference of Branches of the NAACP and their respective branches (hereinafter NAACP) against the above-captioned renewal applications;[1] (iii) the licensee's opposition to the petitions; (iv) the licensee's response to Commission inquiries; and (v) a Joint Request for Approval of Settlement Agreement filed by the NAACP and the licensee of Stations WHYN(AM)/WHYN-FM.

II. PLEADINGS

2. *Settlement Agreement.* On June 4, 1991, the NAACP and the licensee of Stations WHYN(AM)/WHYN-FM filed a Joint Request for Approval of Settlement Agreement, which requests approval of the agreement, dismissal of the petition to deny, and grant of the stations' licenses. We reviewed the settlement agreement pursuant to 47 C.F.R. Section 73.3588 and *Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process*, 4 FCC Rcd 4780 (1989) and found that the settlement agreement complies with the Commission's rules and policies. Therefore, we dismissed the petition.[2] Letter from Glenn Wolfe, Chief, EEO Branch, to Donald Wilks, President, Wilks-Schwartz Broadcasting (April 26, 1993).

3. However, as is our practice in all cases, we reviewed the station's EEO program and performance pursuant to Section 309 of the Communications Act of 1934, as amended, 47 U.S.C. Section 309. We find that the licensee failed to recruit minorities for over 50% of its vacancies. We will, therefore, grant renewal subject to appropriate remedies and sanctions as discussed below.

III. DISCUSSION

4. Section 73.2080 of the Commission's Rules, 47 C.F.R. Section 73.2080, requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance, the Commission focuses on the licensee's efforts to recruit, employ and promote qualified minorities and women and the licensee's ongoing assessment of its EEO efforts. Such an assessment enables the licensee to take corrective action if qualified minorities and women are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by the licensee. See Sections 73.2080(b) and (c) of the Commission's Rules, 47 C.F.R. Sections 73.2080(b) and (c).

5. When the renewal application indicates an absence of evidence of discrimination and a record of adequate EEO efforts, the application is granted, if otherwise appropriate. When it fails to evidence a record of adequate EEO efforts, the Commission may impose a variety of remedies and sanctions, such as reporting conditions, renewal for less than a full term, forfeiture, or a combination thereof. Further, the Commission will designate the renewal application for hearing where the facts so warrant. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987), *petition for reconsideration pending; see also* 4 FCC Rcd 1715 (1989) (request for clarification by the National Association of Broadcasters); *See e.g., Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501 (D.C. Cir. 1988); *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir 1978).

6. Review of the licensee's renewal application and consolidated opposition/inquiry response reveals that the stations had 27 full-time hiring opportunities, including 22 for upper-level positions, from November 1, 1987, through October 31, 1990.[3] In its renewal application, the licensee indicates contacting the following general sources and receiving the cited number of minority referrals: the *Springfield Union News* (0), American International College (1), Western Massachusetts Job Fair (1), Industry Contacts (1)

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[1] The Petition to Deny was directed at eight other radio stations in Massachusetts, Connecticut and Rhode Island. Six of these renewal applications have already been acted on by the Commission. The remaining two renewal applications will be addressed in a separate order.

[2] Due to the settlement agreement reached by the parties, the issue of standing is moot.

[3] The Springfield, Massachusetts Metropolitan Statistical Area (MSA) is 7.2% minority (4.2% Black, 2.4% Hispanic and .6% other). The licensee took control of the stations on September 14, 1987. The stations' 1988 Annual Employment Report lists no minorities on an overall staff of 28 and on an upper-level staff of 23. According to an amended Annual Employment Report filed with the opposition, in 1989, the stations employed one Hispanic on an overall staff of 33 (3.0%) and on an upper-level staff of 30 (3.3%). In 1990 and 1991, the stations employed no minorities on overall staffs of 31 and 33 and on upper-level staffs of 27 and 30.

and employees (1). The licensee also reports contacting, but receiving no minority referrals from, the *New England Minority News*. The licensee indicates that it did not affirmatively recruit for 12 of the 27 vacancies. For these positions, the successful applicant was a former employee, walk-in, referred by an employee or industry contact, or chosen because his or her resume was already on file.[4] For seven additional vacancies, the licensee also contacted the Connecticut School of Broadcasting and/or *Radio and Records Magazine*. The licensee specifically recruited a particular applicant for two positions and contacted a temporary agency and/or aired a radio ad for three other positions. For the remaining three vacancies, it contacted at least ten general, one women's and four minority sources.

7. The licensee did not have applicant or interview data for three of its positions. Six of the 61 applicants for the remaining 24 positions were minorities and minorities were in the applicant pool for five of the positions. Four of the 48 interviewees were minorities and minorities were in the interview pool for four of the 24 positions. The licensee hired two Hispanics for upper-level positions.

8. In its opposition/inquiry response, the licensee states that despite a relatively small, local minority population, it has obtained minority referrals and hired minorities for full-time positions. It states that the results of its individual recruitment efforts are more notable than those achieved through adherence to the Commission's model EEO program. These results include the hiring of two Hispanics, both of whom were referred by employees, for sales positions. The licensee contends that with these two hires it exceeds parity in hires for both overall and upper-level positions.

9. The licensee describes future changes to its EEO program which it agreed to as apart of a settlement agreement with the NAACP. These changes include: establishing a minority internship program; contacting the Springfield Branch of the NAACP as well as three other sources of minorities when job vacancies occur; and holding annual meetings with the President of the Springfield Branch of the NAACP to discuss various EEO matters. The licensee states that "its proposed agreement with the NAACP will ensure future compliance with all aspects of its EEO Program."

10. There are no substantial and material questions of fact to warrant designation for hearing. *Astroline Com. Co. Ltd. Partnership v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988). Moreover, there is no evidence that the licensee engaged in employment discrimination. The licensee contacted recruitment sources, including minority organizations, received minority referrals, interviewed minority applicants and hired minorities for upper-level positions. However, the licensee failed to recruit for 12 of its 27 vacancies and failed to recruit minorities for 22 of its applicant pools and 23 of its interview pools. We believe that a $12,500 forfeiture and a short term renewal are appropriate sanctions for violations of the Commission's EEO Rule in this case. Based on the foregoing, we will grant renewal for a short term subject to reporting conditions and a Notice of Apparent Liability of forfeiture for $12,500.

VI. CONCLUSION

11. After reviewing the record before us, we find that no hearings are warranted and the renewal applications of WHYN(AM)/WHYN-FM should be granted. However, their renewal applications will be granted for a short term subject to reporting conditions and a Notice of Apparent Liability of forfeiture for $12,500.

V. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED that the license renewal applications filed by New England Radio Corporation for Stations WHYN(AM)/WHYN-FM ARE GRANTED FOR A SHORT TERM ending April 1, 1996, subject to reporting conditions as described herein[5] and, pursuant to Section 503 of the Communications Act of 1934, as amended, 47 U.S.C. Section 503, a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of $12,500.

13. IT IS FURTHER ORDERED that the licensee of WHYN(AM)/WHYN-FM submit to the Commission an original and one copy of the following information on December 1, 1993, December 1, 1994, and December 1, 1995:

(a) For each report, please make two lists divided by full-time and part-time vacancies during the 12 months preceding the respective reporting dates, indicating the job title and FCC job category of the position, the race or national origin, sex and the referral source of each applicant for each and the race or national origin and sex of the person hired. The lists should also note which recruitment sources were contacted;[6]

(b) A list of employees as of the November 1, 1993 payroll period for the first report and as of the November 1, 1994, and November 1, 1995 payroll periods for the second and third reports by job title and FCC job category indicating full-time or part-time status (ranked from highest paid classification), date of hire, sex and race or national origin;

(c) details concerning the stations' efforts to recruit minorities for each position filled during the 12-month period specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment. In addition, the licensee may submit any relevant information with regard to the station's EEO performance and efforts thereunder.

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[4] We note that Hispanics were hired for two of these positions.

[5] In view of the assignment application recently granted by the Commission, we note that, upon consummation of the sale, the reporting conditions and short term renewal will follow the license and pass automatically to the assignee. *See Woolfson Broadcasting, Inc.*, 4 FCC Rcd 6160 (1989).

[6] Such a list might start: (1) News Director; Officials and Managers; Full-time

3 Applicants:	1 White female	A.W.R.T.
	1 Black male	Urban League
	1 Black female	NAACP

Sources Contacted: Local Newspaper, A.W.R.T., Urban League, and NAACP Selected: Black male (03/15/91)

14. IT IS FURTHER ORDERED that the Mass Media Bureau send by Certified Mail -- Return Receipt Requested -- one copy of this Memorandum Opinion and Order and Notice of Apparent Liability to all parties.

15. The reports are to be filed with the Secretary of the Commission to the attention of the Mass Media Bureau's EEO Branch. Should the parties have any questions regarding this action, they may telephone the Mass Media Bureau's EEO Branch (202-632-7069). Regarding the forfeiture proceedings for WHYN(AM)/WHYN-FM, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this Memorandum Opinion and Order and Notice of Apparent Liability. Any comments relating to the ability to pay should include those financial letters set forth in the attached note.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Dissenting Statement of
Chairman James H. Quello

In re Applications of
New England Radio Corporation
For Renewal of License of Stations
WHYN(AM)/WHYN-FM
Springfield, Massachusetts

I do not believe that the extreme sanction of a short term license renewal is warranted on the facts of this case.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-85

In re Appearances of

SUN OVER JUPITER BROADCASTING, INC.	File No. BPH-890913MG
TRIPLE J PROPERTIES, INC.	File No. BPH-890913MI
INTERMART BROADCASTING OF PALM BEACH, INC.	File No. BPH-890914MG
TERRY D. MOORE d/b/a PELICAN BROADCASTING	File No. BPH-890914MK
AFRO-AMERICAN BROADCASTERS LIMITED	File No. BPH-890914MS
MARILYN BIRK	File No. BPH-890914MV
LIGHTHOUSE BROADCASTING, INC.	File No. BPH-890914MZ
MANUEL PALAU	File No. BPH-890914NX
JUPITER RADIO BROADCASTING, INC.	File No. BPH-890914OE

For Construction Permit for
New FM Station on Channel 288A,
Jupiter, Florida

MEMORANDUM OPINION AND ORDER

Adopted: November 12, 1993; Released: November 24, 1993

By the Review Board: MARINO (Chairman) and GREENE; Board Member BLUMENTHAL issuing Separate Statement.

1. Before the Review Board is the *Initial Decision* of Administrative Law Judge Joseph Chachkin, 8 FCC Rcd 2283 (1993), (*I.D.*), which granted the application of Triple J Properties, Inc., and denied the remaining applications on comparative grounds. In doing so, he gave no integration credit to Afro-American, whom he acknowledged would be the qualitatively superior applicant if given the quantitative credit sought. Afro-American has excepted to this treatment; its competitors support the *Initial Decision* on this point. The Board held oral argument on October 1, 1993. In light of the pleadings before us and the discussion at the oral argument, we conclude that further hearing is necessary before Afro-American's qualifications can be resolved.

2. Afro-American is a limited partnership with one general partner, Jimmie Horne, Jr. who holds a thirty percent equity interest, and one purported limited partner, Kenneth Dawson who holds the remaining seventy percent equity interest. *I.D.* at ¶ 49. In spite of partnership documents requiring Dawson's insulation from the day-to-day affairs of the partnership and the testimony of both Horne and Dawson that they have honored the insulation requirement, the ALJ concluded that "Afro-American's integration proposal is unworthy of credence and integration credit is denied." *I.D.* at ¶ 129 (citation omitted). He summarized:

> Dawson's dominant role becomes abundantly clear when the totality of the evidence is examined. Dawson's financial dominance, the circumstances surrounding the filing of the application, Dawson's role in the selection of legal and engineering counsel, and Dawson's post-formation involvement convincingly demonstrate Dawson's total control of the applicant.

I.D. at ¶ 124. His reasons are set forth in paragraphs 125-129 and need not be repeated here. They are based primarily on his view of the credibility of Afro-American's principals, particularly Dawson.

3. Afro-American has challenged the ALJ's analysis on each of these points, arguing that his conclusions are not supported by record evidence or are based on improper surmises. The financial dominance found by the ALJ was based only on the size of the financial stakes Horne and Dawson have in the applicant as compared to their respective equity interests, *id.* at ¶ 125,[1] but as Afro-American points out in its Brief at 5, it was not based on any record evidence that Dawson's financial commitment gives him power to control the applicant or has been used to monitor the applicant's management. Although financial leverage can be one indicator of *de facto* control, other factors must also be considered, for "financial investment . . . is not necessarily the *sine qua non* of an ownership interest creditable for integration purposes." *KIST Corp.*, 99 FCC 2d 173, 190 (Rev. Bd. 1984), *quoted with approval in KIST Corp.*, 102 FCC 2d 288, 290 (1985), *aff'd sub nom. United American Telecasters, Inc. v. FCC*, 801 F.2d 1436 (D.C. Cir. 1986) (Table), *cert. denied*, 481 U.S. 1050 (1987); *see Independent Masters, Ltd.*, 104 FCC 2d 178, 188-89 (Rev. Bd. 1986). As Afro-American also points out in its Brief at 5-6, Horne agreed to contribute in proportion to his means

[1] Although receiving a 30% interest, Horne is required to contribute only $2,300, which the ALJ calculated to be 0.74% of

(*I.D.* at ¶ 125),[2] to make the rest of his contribution in-kind, and to bear full financial exposure as the general partner (tr. 937-38).[3]

4. According to Afro-American, Horne has played an active role in prosecuting the application. Its Exh. 2 at 9-10 explains without contradiction that he prepared the application and the EEO program; established and maintained the public file; published the local notices; is the contact with FCC counsel and recipient of invoices from counsel; established and is the sole signatory on the bank account; receives and pays the bills from the applicant's account; and receives communications from FCC counsel regarding the status of the proceeding. This kind of participation by the general partner (who has broadcast and business experience) as well as the trust that Afro-American claims had developed between the partners from their past business and other associations, *see* tr. 1038; *I.D.* at ¶ 60, distinguishes Afro-American from cases where the purported limited partners developed the applicant and then gave away the store to a virtual stranger to garner undeserved integration advantage. *See, e.g., Rancho Mirage Radio*, 7 FCC Rcd 480, 480-481 (Rev. Bd. 1992); *Fresno FM Limited Partnership*, 6 FCC Rcd 6998, 6998-99 (1991), *recon. denied*, 7 FCC Rcd 4339 (1992); *Poughkeepsie Broadcasting Limited*, 5 FCC Rcd 3374, 3374-76 (Rev. Bd. 1990), *rev. denied*, 6 FCC Rcd 2497 (1991); *Metroplex Communications, Inc.*, 4 FCC Rcd 8149, 8156-60 (Rev. Bd. 1989), *modified*, 5 FCC Rcd 5610 (1990), *aff'd mem. sub nom. Southeast Florida Broadcasting v. FCC*, 947 F.2d 505 (D.C. Cir. 1991). Horne's active role in preparing and prosecuting the application, his past broadcast and business experience, and the insulation provisions of the limited partnership agreement distinguish this case from Jupiter Radio's cite to *Scottsdale Talking Machine and Wireless Co., Inc.*, 6 FCC Rcd 7539, 7541-42 (Rev. Bd. 1991), *rev. denied*, 7 FCC Rcd 4422 (1992), where the Board found the limited partner's giving away of the store to be "illusory and fatally flawed." Normally, the kind of participation demonstrated by Horne would result in integration credit at least for Horne's interest, as counsel for Sun Over Jupiter appeared to agree at oral argument. *See* tr. 1848-49. *See generally, e.g., HS Communications*, 8 FCC Rcd 3237, 3237 n.3 (1993).

5. Horne's active role does not prove, however, that Dawson might not have crossed the line between active and passive involvement in the applicant. The ALJ concluded that Dawson selected Afro-American's counsel and engineering consultant by using April Wortham, a friend and former colleague of both Dawson and Horne, to indirectly signal names to Horne rather than suggesting them himself. *I.D.* at ¶ 128. But even if true, this does not, by itself, insinuate Dawson into an active role in the applicant's affairs. As Afro-American points out, this occurred before the bifurcated ownership arrangement was formalized, *see Coast TV*, 5 FCC Rcd 2751, 2752-53 ¶ 15 (1990), and there is no direct evidence contradicting Horne's and Dawson's testimony that, regardless of the source of the suggestions about professional assistance, Dawson did not control Horne's selections. The ALJ also concluded that Dawson has on-going involvement in Afro-American's affairs because he has been copied with correspondence from communications counsel. *I.D.* at ¶ 129. But, Afro-American correctly points to *Coastal Broadcasting Partners*, 7 FCC Rcd 1432, 1434 ¶ 15, *recon. denied*, 7 FCC Rcd 6594 (1992), where the Commission did not find that merely receiving copies of correspondence form counsel breached the insulation expected of a passive owner. As Afro-American argues, no evidence in the record shows that these communications led to any act by Dawson to influence the applicant's affairs.

6. The ALJ's conclusion about Dawson's dominance of the applicant is not based just on these examples, however. He found an "elaborate scheme to conceal Dawson's active involvement and perpetuate the myth of his passivity," *I.D.* at ¶ 128, and disbelieved testimony to the contrary from Afro-American. Because Dawson individually had actively pursued the Jupiter allotment just seven months before deciding to participate only passively in Afro-American's Jupiter application, the ALJ concluded that the circumstances surrounding the filing were "suspicious" and that Dawson "was less than candid in explaining why he had not carried out his promised commitment to apply to Jupiter." *Id.* at ¶ 126. Because Dawson and Horne were friends and business associates when Dawson was involved in the allotment rulemaking, the ALJ found their testimony that Horne learned of the allotment from the local newspaper "improbable." *Id.* at ¶ 127. Because that testimony was "improbable," he found Dawson's testimony that he never told Horne of his participation in the allotment process or of his use of Nora Garrote's legal assistance in that proceeding "stretches credulity." *Id.* From this he concluded that Dawson rather than Horne must be the prime mover and the limited partnership merely "a stratagem to conceal Dawson's true role." *Id.* He found reinforcement in this conclusion from Horne's choice of legal and engineering counsel for "[i]t defies reason to believe that Dawson would recommend Garrote to Wortham [for her White City application] but would not impart that information to his partner in the Jupiter venture." *Id.* at ¶ 128. Because local counsel was also known to Dawson, the ALJ also concluded that Dawson rather than Afro-American's communications counsel selected local counsel. *Id.*

7. Lighthouse Broadcasting has argued that the ALJ's decision must stand because it is based on important demeanor findings that should be given particular deference. Lighthouse Broadcasting Reply Brief at 13-14. At oral argument counsel argued, "He looked these witnesses in the eye and he said, I don't believe their story." Tr. 1790; *see* similar argument from counsel for Palau at tr. 1794. But, the ALJ made no findings on demeanor as such. His conclusions are expressed in terms of the plausibility of the

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the needed financing. The rest is to come from Dawson.

[2] Horne testified he paid a site location fee and the application filing fee for a total of $2,300. He also said he paid some out-of-pocket expenses and some personal travel and legal expenses for which he does not expect reimbursement. Tr. 798-804, 934.

[3] In *Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 FCC 2d 849, 853-55 (1982) (concerning tax certificates and distress sales), the Commission acknowledged the unique nature of the limited partnership device to assist minority group individuals in obtaining financing. It further explained that it would continue to review such arrangements to ensure that complete managerial control is as represented in order to avoid "sham" arrangements. *Id.* at 855. This policy was reaffirmed for limited partnerships used to finance applicants for new stations in *KIST Corp.*, 102 FCC 2d at 290 n.5 . "We reject . . . that an essential element of meaningful minority participation is financial obligation." *Id.*

explanations about how the application came about and was prosecuted.[4] In *Ft. Collins Telecasters*, 103 FCC 2d 978, 986 ¶ 12 (Rev. Bd. 1986), cited by Lighthouse Broadcasting, the Board explained, "[W]e generally defer to an ALJ's well-considered conclusions regarding the integration claims of an applicant's principals, particularly where such judgments partake of what we might call a credibility' finding."[5] But, this deference is appropriate only when the ALJ's credibility findings are supported by substantial evidence. *See Abacus Broadcasting Corp.*, 8 FCC Rcd 5110, 5114 n.8 (Rev. Bd. 1993), citing *Naguabo Broadcasting Co.*, 6 FCC Rcd 912, 919 (Rev. Bd. 1991), *modified on other grounds on recon.*, 7 FCC Rcd 1696 (1992); *TeleSTAR, Inc.*, 2 FCC Rcd 5, 12-13 (Rev. Bd. 1987), *recon. granted in part and denied in part*, 3 FCC Rcd 2860 (1988), *aff'd by judgment*, 886 F.2d 442 (D.C. Cir. 1989 (Table). While recognizing that the ALJ has had the opportunity to observe the witnesses first hand, the Board must make a fair estimate of all the relevant evidence and not merely rubber stamp the findings of an ALJ. *See generally FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358 (1955); *Universal Camera Corp.*, 340 U.S. 474, 489-90 (Frankfurter, J.); *Lorain Journal Co. v. FCC*, 351 F.2d 824, 828 (D.C. Cir. 1965). On the one hand, "'integration' credit will not automatically be awarded on a naked claim where other objective evidence substantially undercuts that anemic claim," *Ft. Collins, supra*,[6] but on the other hand, it will not be withheld if the ALJ's doubts are not borne out by the record, including inferences properly drawn therefrom.

8. Here, the record evidence of Afro-American's integration intentions other than its limited partnership agreement is the testimony given by Horne and Dawson, which included explanations about how the application came about that the ALJ simply disbelieved. While the Commission should not accept representations that are "at best highly implausible and at worst utterly ridiculous," *WHW Enterprises, Inc. v. FCC*, 753 F.2d at 1141, we are concerned that Afro-American's representations are not as clearly implausible on their face as the ALJ has concluded, at least from the record evidence before us. Afro-American argues that Horne could indeed have learned of the allotment in the local press, as he testified without contradiction at tr. 769, and that there is no reason from the record to expect that Horne would have been told everything Dawson did. Afro-American Brief at 9. Horne does not appear to have been locked into doing business only with Dawson. He testified he contacted four people to see if they were interested before contacting Dawson. *I.D.* at ¶ 61, tr. 784. Afro-American also argues that Dawson's participation in the application as a limited partner is not inconsistent with the representations of interest in applying for the channel he made in the allotment rulemaking, and his decision to proceed as a passive rather then active owner reflects changed circumstances in his life. Afro-American Brief at 7-8; *see I.D.* at ¶ 58.[7] It argues that there was no effort to hide the fact that Wortham got the names she suggested to Horne from Dawson, which would seem to be inconsistent with any deceptive "elaborate scheme." Afro-American Brief at 9-10. It further argues, "There is nothing inherently suspect about Mr. Horne and Ms. Wortham sharing information at a time when she was also herself applying for a local broadcast allotment [in White City]." *Id.* at 10.

9. Other parties argue that the record is at least incomplete with respect to Dawson's intentions regarding the Afro-American application because the ALJ erroneously rejected evidence that would corroborate the conclusion a different ALJ reached after the Jupiter hearing in *William F. Peel, Jr.*, 7 FCC Rcd 3286, 3291-93, 3302 (ALJ 1992) (*White City I.D.*), that "Ken Dawson is the key force behind three cookie-cutter' FM applications for three Florida east coast resort communities: White City, Port St. Lucie, and Jupiter," *id.* at 3291 ¶ 61,[8] although he is a party only in the Jupiter application.[9] The *White City I.D.* describes "alarmingly similar" formational documents for the three applications, *id.* at 3291 ¶ 64, and finds that each applicant was formed in an identical manner, *id.* at ¶ 66. The White City ALJ made credibility findings about Dawson's testimony that raise questions about his veracity in that proceeding. For example, he found Dawson's efforts to

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[4] Demeanor evidence relates to the witness' behavior on the witness stand and may be considered by the trier of fact on the issue of credibility. Black's Law Dictionary 430 (6th ed. 1990). Although the ALJ here did not attach credibility to Afro-American's integration proposal, he made no specific findings about its principals' physical appearance during their testimony. The debate in legal and judicial circles as to the reliability of recorded demeanor findings is described in *TeleSTAR, Inc.*, 2 FCC Rcd 5, 12-13 (Rev. Bd. 1987).

[5] *See WHW Enterprises, Inc. v. FCC*, 753 F.2d 1132, 1142 (D.C. Cir. 1985 (credibility findings of an ALJ may not be "upset . . . unless . . . reversal is supported by substantial evidence.") (and cases cited therein); *accord Broadcast Associates of Colorado*, 104 FCC 2d 16, 19 (1986) (absent *extrinsic* evidence to the contrary, an ALJ's credibility findings are entitled to "great weight").

[6] Integration credit was not awarded in *Ft. Collins* where the claim to credit was based on a terse and self-serving written assertion which failed to explain how the principal would accommodate his deeply embedded interests and executive duties in a multimillion dollar retail operation.

[7] Dawson testified at tr. 974:

> Well, by '89 the situation had changed. I was not that interested, and that's why I went back to my family and asked them for guidance as to what I should do because I was wavering on my decision as to getting back into broadcasting since all that time had elapsed and my health had gotten worse. A situation had come up in my life, and I wasn't certain I wanted to get back into broadcasting in 1989. That's why I went to my family for guidance. My situation had changed.

[8] Among the rejected documents are limited partnership agreements for White City and Port St. Lucie applicants that are similar to Afro-American's documents; a transmittal letter from counsel confusing Minority Broadcasting with Afro-American; invoices for the White City proceeding from counsel reflecting telephone conversations with Dawson re White City or "Jupiter/White City applications." Rejected Jupiter Radio Exhs. 10-11, 13, 15-18.

[9] Because of his findings about Dawson's role in Minority Broadcasting's White City application, the White City ALJ concluded at 7 FCC Rcd at 3293 ¶ 87:

> Wortham's overall integration pledge is totally unreliable. Ms. Wortham, although purportedly the sole general partner, does not now and never has controlled the formation and the prosecution of Minority's White City FM application. Nor has she been that active in Minority's affairs.

distance himself from the preparation and prosecution of Minority Broadcasting Group Limited, the White City applicant involving April Wortham, "border on the incredible," *id.* at 3303 n.11; and Dawson's denials of any input in Salsa Radio Limited, the Port St. Lucie applicant involving his mother and Jose Oaks, a former business associate from Connecticut, "don't hold together," *id.* at 3392 ¶ 79. He further found that Dawson's denial that he had advised either Oaks or his mother about their earlier application for an Orlando, Florida station was directly contradicted by the application of his mother and Oaks for an Orlando station and by his later testimony at the White City hearing. *Id.* at ¶ ¶ 77-78. The White City ALJ found that Dawson's stated disinterest in being a broadcast consultant was contradicted by the impressions Wortham and her limited partner had of him as well as by the description of him as a consultant in the Orlando application. *Id.* at ¶ 84. The White City ALJ also made findings that raise questions about testimony given in the Jupiter proceeding. He found that Dawson testified he did not recommend communications counsel to Wortham, *id.* at ¶ 82, although a key point in Afro-American's exceptions is its open acknowledgment that Dawson *did* recommend counsel to Wortham. *See* Afro-American Brief at 9-10.[10] The White City ALJ also disbelieved Wortham's testimony that she prepared her own budget for Minority Broadcasting's White City proposal because of the similarity in construction and operating costs to Afro-American's Jupiter budget. In the Jupiter proceeding Horne was asked whether Wortham worked on her budget at the same time he worked on his "together in your office?" Tr. 847. Horne responded at tr. 848-49 that he provided her with the headings for the budget but not the figures, she used his computer to prepare her budget, and he was there when she was working on her budget.[11] *See* tr. 912-13. The White City ALJ noted as did the ALJ in the instant proceeding that the Afro-American and Minority Broadcasting limited partnership agreements were executed on the same day before the same notary public in Palm Beach County, whom Dawson had suggested to both applicants, although Wortham lived in Miami, Florida, in Dade County. *White City I.D.* at 3291-92 ¶ 71. The notary public, an acquaintance of Dawson's, was located in Boca Raton, tr. 1006, the community where Dawson lived. *I.D.* at ¶ 49.

10. Although no exceptions were taken to the ALJ's findings and conclusions regarding the Minority Broadcasting applicant in *White City, I.D.*, the *White City, I.D.* is not binding on Afro-American for neither it nor Dawson was a party to that proceeding. *See Pantex Towing Corp. v. Glidewell*, 763 F.2d 1241, 1245 (11th Cir. 1985); *Shawn Phalen*, 7 FCC Rcd 7638 (1992). Nonetheless, the *White City I.D.* presents serious questions as to whether Kenneth Dawson has abused the Commission's processes as a real party in interest in one or more applications before the Commission and as to whether he misrepresented or was lacking in candor in the White City proceeding about his true role with respect to applications with which he has been associated, including the Jupiter application. These questions must be resolved before Afro-American's basic qualifications to be a Commission licensee can be determined. *See generally Marr Broadcasting Co, Inc.*, 3 FCC Rcd 562 (Rev. Bd. 1988) (FCC never contemplated that an individual disqualified under misrepresentation/lack of candor issues would be able to retain a passive interest in a broadcast facility); *see generally also Mableton Broadcasting Co., Inc.*, 5 FCC Rcd 6314, 6324 n.11 (Rev. Bd. 1990) (abuse of process/misrepresentation issues arising out of one proceeding can be considered in other licensing proceedings involving the same individual) (subsequent history omitted); *Carta Corp.*, 5 FCC Rcd 3696, 3705 n.13 (Rev. Bd. 1990) (abuse of process issue arising out of another proceeding is relevant to applicant's qualifications) (subsequent history omitted); *Marlin Broadcasting of Central Florida, Inc.*, 4 FCC Rcd 7945, 7957 n.18 (Rev. Bd. 1989) (same) (subsequent history omitted).[12] Parties in this proceeding have argued that a remand is unnecessary because the Jupiter ALJ's credibility findings are sufficient to discredit Afro-American's integration proposal. But, as discussed above, the basis for these findings is not as clear from the record as the parties would have us believe, and at oral argument no one could articulate a basis for upholding these findings other than that the ALJ had looked Afro-American's principals in the eye. At the hearing attempts were made during cross-examination to impugn Afro-American's integration proposal by querying its relationship to White City. Although the ALJ properly restricted this line of inquiry absent an appropriate issue, *see, e.g.*, tr. 1043, 1051, which no party sought,[13] the spectre of White City appears to have permeated this proceeding and should be faced in the open, as should the questions of Dawson's veracity. *Cf. Evansville Skywave, Inc.*, 7 FCC Rcd 1699, 1700 (1992); *Mableton Broadcasting Company, Inc.*, 5 FCC Rcd at 6323, *generally Las Misiones de Bejar TV Co.*, 93 FCC 2d 191, 196-97 (Rev. Bd. 1983), wherein the Commission and the Board have expressed a preference for directly rather than indirectly addressing basic qualifying issues.

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[10] Dawson's testimony about how he learned of the Jupiter allotment is also curious. Although testifying that he would call Garrote from time to time to inquire about the status of the rulemaking, tr. 976, he testified that he learned about the channel in a broadcast journal or perhaps from an acquaintance at a Jupiter station, tr. 966-68. He wasn't sure if she had called him or sent him information about the allotment. "I guess as a matter of course she may have sent me something." Tr. 977, 1038. He did see a copy of the allotment report and order. Tr. 1039, 1041-42.

[11] Horne testified he received the headings from a consulting engineer via his communications counsel, tr. 930, who was also Wortham's counsel. The parties did not accept the ALJ's invitation at tr. 931-32 to bring in Wortham for rebuttal testimony about whether she also received budget headings from counsel.

[12] We note that ALJs have enlarged issues to determine whether someone associated with an applicant may have abused FCC processes or misrepresented in other comparative proceedings. *See Carmel Broadcasting Limited Partnership*, FCC 90M-3695 (ALJ released Nov. 23, 1990) (abuse of process); *Ocean Corp.*, 63 RR 2d 1517, 1522 (ALJ 1987) (misrepresentation). *See also Western Cities Broadcasting, Inc.*, 5 FCC Rcd 6177, 6180 ¶ 22 (Mass Med. Bur. 1990) (adding contingent qualifying issue where real party in interest issue being litigated against applicant's principal in another proceeding).

[13] At oral argument the motive ascribed to Dawson for attempting to control other stations was the possibility of joint marketing of stations covering the east coast of Florida. *See* tr. 1797. The ALJ below repeatedly advised parties believing in some sort of conspiracy of this sort to file a petition to enlarge issues if they had any supporting evidence. *See, e.g.*, tr. 1564, 1568. No such petitions were filed.

11. ACCORDINGLY, IT IS ORDERED That this proceeding IS REMANDED for further hearing consistent with this opinion and for preparation of such Supplemental Initial Decision as may be warranted by a supplemental record on the following issues:

1. To determine whether Kenneth Dawson, the purported limited partner of Afro-American Broadcasters Limited, has abused the Commission's processes in other comparative hearing proceedings (e.g., White City, FL, MM Docket No. 91-86; Port St. Lucie, FL, MM Docket No. 91-83), and, if so, the effect thereof on the qualifications of Afro-American Broadcasters Limited to be a Commission licensee.

2. To determine whether Kenneth Dawson engaged in misrepresentation or lack of candor and, if so, the effect thereof on the qualifications of Afro-American Broadcasters Limited to be a Commission licensee.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

SEPARATE STATEMENT OF
BOARD MEMBER NORMAN B. BLUMENTHAL

As the majority order observes, the law has long mandated that the credibility findings of a federal Administrative Law Judge may not be "upset ... unless ... reversal is supported by substantial evidence." *WHW Enterprises, Inc. v. FCC*, 753 F.2d 1132, 1142 (D.C. Cir. 1985)(and cases cited therein). *Accord Broadcast Associates of Colorado*, 104 FCC 2d 16, 19 (1986)(absent *extrinsic* evidence to the contrary, an ALJ's credibility findings are entitled to "great weight").

In two discrete comparative licensing hearings, now, two different Commission ALJs have each entered formal findings that one Kenneth Dawson, a 70% principal of the subject applicant, has lacked candor and credibility in his sworn record testimony. *See ante*, paras. 9-10. In the face of these adverse candor findings, the Board simply cannot -- as a matter of *law* -- find the subject applicant basically qualified. *See, e.g., Marr Broadcasting Co., Inc.*, 3 FCC Rcd 562 (Rev. Bd. 1988)(candor and character of all applicant principals, "active" or "passive," relevant to basic qualifications).

Inasmuch as the subject applicant appears otherwise to possess the strongest *comparative* attributes, this case cannot move forward until its *basic* character qualifications are examined under an appropriate hearing issue. *See generally Mableton Broadcasting Co., Inc.*, FCC 93R-53, released October 22, 1993, at para. 3. In this matter, the Board has no legitimate alternative that fairly treats *all* of the instant applicants.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Billing Name and Address Tariffs
of Local Exchange Carriers

MEMORANDUM OPINION AND ORDER

Adopted: November 16, 1993; Released: November 16, 1993

By the Chief, Tariff Division, Common Carrier Bureau:

1. On June 9, 1993, the Commission released the *BNA Order*,[1] requiring local exchange carriers (LECs) to file tariffs for the provision of billing name and address information (BNA) to telecommunications service providers. Specifically, LECs were required to file tariffs for the provision of BNA information of customers with listed telephone numbers within 90 days of the release date of the Order, or September 8, 1993.[2] Lincoln filed its BNA tariff on September 7, 1993, and 45 other LECs filed BNA tariffs on September 8, 1993. A list of the LECs filing tariffs, with abbreviations for each LEC which are addressed in this Order, is found at Appendix A.

2. On September 23, 1993, General Communication, Inc. (GCI) filed separate petitions to reject or suspend and investigate the BNA tariff filings of Anchorage and NECA. Also, Sprint Communications Company LP (Sprint) filed a petition to reject the BNA tariffs of the Bell Operating Companies (BOCs),[3] Cincinnati Bell, and SNET. On October 4, 1993, eleven parties filed replies.[4] We deferred the effective date of the petitioned tariff filings, and the BNA filings of certain other carriers, to November 17, 1993, and permitted the other BNA filings to take effect as originally scheduled.[5] For reasons discussed below, we deny the petitions to reject or suspend and investigate BNA tariff filings except for those four which are still under review.

3. GCI asserts that NECA underestimates BNA demand, resulting in unreasonably high BNA rates. GCI contends that NECA bases its demand estimates on an assumption that all telecommunications service providers (TSPs) have billing and collection agreements with LECs.[6] NECA argues that GCI's expected demand is not a good measure of industry demand because GCI is unique among TSPs because it performs its own billing and collection.[7] Several LECs assert that their demand estimates are based on historical data, and this data has been stable.[8]

4. Sprint notes that there is a wide variation in the LEC BNA rates, ranging from $0.02 to $3.75 per record found, and nonrecurring charges ranging from zero to $3250.[9] Several LECs reply that variation in BNA rates is not sufficient for rejecting or suspending any particular BNA tariff.[10]

5. Sprint contends that SNET has not adequately explained the cost estimates for updating computer records it used to develop its service establishment charge.[11] SNET replies that, because it currently does not provide BNA, it must incur costs associated with developing new computer systems for providing BNA.[12] GCI asserts that NECA's projected revenue is inconsistent with its estimated number of requests per year and the level of its per order charge.[13] NECA maintains that GCI erroneously applied the per order charge to the number of queries instead of the number of orders.[14]

6. Sprint maintains that LECs should specify a certain number of days within which BNA orders will be filled.[15] A number of LECs oppose placing a rigid response time in their tariffs.[16] However, some LECs would be willing to include language in their tariffs that they would deliver BNA within a reasonable time or would work with BNA customers to develop a mutually agreeable response time.[17] Sprint argues that Bell Atlantic should not require TSPs ordering BNA to sign nondisclosure agreements with respect to unlisted and nonpublished telephone numbers, because it is unnecessary since BNA cannot be used for anything other than billing and collection as required by the *BNA Order*.[18] Bell Atlantic contends that it is not unreasonable to ask TSPs to acknowledge their obligation to use BNA only for billing purposes.[19]

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[1] Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, CC Docket No. 91-115, Second Report and Order, 8 FCC Rcd 4478 (1993) (*BNA Order*), *recon. pending*.

[2] *BNA Order*, 8 FCC Rcd at 4487 (para. 45). The tariffing requirements of the *BNA Order* did not distinguish between listed and unlisted customers. However, in the *First Reconsideration Order*, the Commission extended the deadline for filing tariffs for the provision of the BNA information of customers with nonpublished or unlisted telephone numbers to February 9, 1993. Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, Reconsideration and Petitions for Stay, CC Docket No. 91-115, 8 FCC Rcd 6393 (*First Reconsideration Order*).

[3] The BOCs whose tariffs are addressed in this Order are Ameritech, Bell Atlantic, BellSouth, NYNEX, Southwestern Bell, and US West.

[4] The LECs filing replies are Ameritech, Anchorage, Bell Atlantic, BellSouth, Cincinnati Bell, NECA, NYNEX, SNET, Southwestern Bell, and US West.

[5] The effective dates of four tariffs, United, Centel, Pacific Bell and Nevada Bell, have been further deferred to December 7, 1993. We will consider the petition to reject or suspend these filings in a future order.

[6] GCI Petition against NECA at 1-2.

[7] NECA Reply at 3-4.

[8] SNET Reply at 3; Southwestern Bell Reply at 3.

[9] Sprint Petition at 2-3.

[10] Bell Atlantic Reply at 2; Southwestern Bell Reply at 3-4; Ameritech Reply at 2.

[11] Sprint Petition at 4.

[12] SNET Reply at 2.

[13] *Id.* at 3.

[14] NECA Reply at 4.

[15] Sprint Petition, App. A at 9.

[16] Cincinnati Bell Reply at 4; BellSouth Reply at 3-4; Ameritech Reply at 2; Bell Atlantic Reply at 2.

[17] BellSouth Reply at 3-4; PacTel Reply at 7; Ameritech Reply at 2.

[18] Sprint Petition, App. A at 7.

[19] Bell Atlantic Reply at 2-3.

7. Sprint observes that NYNEX and SNET state in their tariffs that, due to "normal end user account activity," the BNA information provided may not be the same as the BNA information applicable at the time of the call. Sprint requests that NYNEX and SNET warrant that BNA will be accurate if a TSP submits a BNA request at least 90 days after the call is made.[20] SNET states that it retains BNA information on all active accounts, which includes discontinued accounts for which there remains a balance.[21] SNET argues that closed accounts are essentially useless to a billing party, and are expensive to maintain.[22] NYNEX argues that, because of normal end user account activity, such as end users moving to new addresses, NYNEX cannot warrant up-to-the-minute BNA accuracy.[23] For its part, BellSouth explains that it waits 90 days before reassigning disconnected residential telephone numbers, and one year before reassigning disconnected business telephone numbers.[24] Sprint also requests Bell Atlantic to explain its procedures for ensuring that BNA is as accurate as possible.[25]

8. Sprint maintains that LECs should not impose service establishment charges on TSPs who obtain BNA through billing and collection services or intrastate tariffs.[26] SNET contends that it has no existing BNA customers, so that it is reasonable to impose service establishment charges on new customers.[27] Cincinnati Bell and NYNEX state that they do not intend to impose their service establishment charge on existing customers.[28]

9. According to Sprint, the industry standard for BNA requests and responses is the CARE format, and maintains that NYNEX and SNET should specify in their tariffs that BNA will be available in this format.[29] These LECs deny that CARE is a standard format, and assert that several LECs use the Bell Communications Research (Bellcore) EMI/EMR format.[30] GCI criticizes Anchorage's tariff filing because there are no provisions for placing BNA orders through magnetic tape.[31] Anchorage claims that BNA on magnetic tape will be made available through Anchorage's contract billing and collection service.[32] Anchorage also denies that magnetic tape would lower BNA costs because Anchorage asserts that retrieving BNA data and checking to determine whether those end users have authorized BNA disclosure are labor-intensive procedures.[33]

10. Finally, Sprint claims that Ameritech's minimum monthly charge of $37.50 for 75 BNA requests and Cincinnati Bell's volume discounts might disadvantage customers who have only a few requests per month.[34] Ameritech contends that it must render a bill each month to each BNA purchaser, regardless of whether that BNA customer has purchased any BNA that particular month, and the $37.50 charge recovers the costs associated with rendering bills.[35] Cincinnati Bell replies that, while labor costs per BNA query does not vary with the number of queries, computer processing costs do vary with the number of BNA queries.[36] Cincinnati Bell also notes that the Commission did not prescribe any rate structure for BNA.[37]

11. We have reviewed the BNA tariffs listed in Appendix A, the petitions to reject or suspend and investigate those tariffs, and the LECs' replies. We conclude that no compelling argument has been presented that these tariffs are patently unlawful so as to warrant rejection, or that an investigation is warranted at this time.

12. Accordingly, IT IS ORDERED that the petitions for rejection or suspension and investigation filed by General Communication, Inc. and Sprint Communications Company LP, against one or more of the transmittals listed in Appendix A of this Order, ARE DENIED, to the extent indicated above.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

APPENDIX A

CARRIERS FILING BNA TARIFFS

1. Ameritech Operating Companies (Ameritech): Revisions to Tariff F.C.C. No. 2, Transmittal No. 739.

2. Anchorage Telephone Utility (Anchorage): Revisions to Tariff F.C.C. No. 5, Transmittal No. 69.

3. Bell Atlantic Telephone Companies (Bell Atlantic): Revisions to Tariff F.C.C. No. 1, Transmittal No. 596.

4. BellSouth Telecommunications, Inc. (BellSouth): Revisions to Tariff F.C.C. No. 1, Transmittal No. 142.

5. Cincinnati Bell Telephone Company (Cincinnati Bell): Revisions to Tariff F.C.C. No. 35, Transmittal No. 635.

6. GVNW Inc./Management (GVNW): Revisions to Tariff F.C.C. No. 1, Transmittal No. 85.

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[20] Sprint Petition, App. A at 2.
[21] SNET Reply at 4. SNET explains that accounts usually remain active for 30 to 90 days after they have been discontinued. *Id.* at 4 n.7.
[22] SNET Reply at 4. *See also* NYNEX Reply at 3 ("most current" BNA is what most TSPs need for billing).
[23] NYNEX Reply at 3.
[24] BellSouth Reply at 3.
[25] Sprint Petition, App. A at 2.
[26] Sprint Petition, App. A at 4.
[27] SNET Reply at 5.
[28] Cincinnati Bell Reply at 3-4; NYNEX Reply at 3.
[29] Sprint Petition, App. A at 5.
[30] SNET Reply at 5; NYNEX Reply at 3-4.
[31] GCI Petition against Anchorage at 1-2.
[32] Anchorage Reply at 1-2.
[33] Anchorage Reply at 2-3.
[34] Sprint Petition at 3-4, and App. A at 6.
[35] Ameritech Reply at 2.
[36] Cincinnati Bell Reply at 2-3.
[37] *Id.* at 3.

7. Lincoln Telephone and Telegraph Company (Lincoln):[38] Revisions to Tariff F.C.C. No. 2, Transmittal No. 76.

8. National Exchange Carrier Association (NECA): Revisions to Tariff F.C.C. No. 5, Transmittal No. 567.

9. New York Telephone Company and New England Telephone and Telegraph Company (NYNEX): Revisions to Tariff F.C.C. No. 1, Transmittal No. 224.

10. Southern New England Telephone Company (SNET): Revisions to Tariff F.C.C. No. 39, Transmittal No. 576.

11. Southwestern Bell Telephone Company (Southwestern Bell): Revisions to Tariff F.C.C. No. 73, Transmittal No. 2296.

12. Union Telephone Company (Union): Revisions to Tariff F.C.C. No. 2, Transmittal No. 39.

13. US West Communications, Inc. (US West): Revisions to Tariff F.C.C. No. 1, Transmittal No. 397.

14. Virgin Islands Telephone Corporation (Vitelco): Revisions to Tariff F.C.C. No. 1, Transmittal No. 20.

[38] Lincoln filed its tariff on September 7, 1993, a day before other BNA tariffs were filed, to be effective on October 22, 1993.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bell Atlantic Telephone Companies Tariff F.C.C. No. 1 — Transmittal No. 586

Facilities Management Service

ORDER

Adopted: November 16, 1993; Released: November 16, 1993

By the Chief, Tariff Division, Common Carrier Bureau:

1. On July 20, 1993, the Bell Atlantic Telephone Companies filed Transmittal No. 586 to establish rates and regulations for Facilities Management Service (FMS). A customer ordering this service assigns Bell Atlantic the responsibility for facility assignment, design and engineering, and routing of its network of voice grade, WATS, digital data, and high capacity special access services in a LATA. In return for surrendering all control over the provisioning of its special access service, the customer would receive a lower price than is currently charged for traditional special access service.

2. Under the tariff, FMS will be provided only in the Washington, D.C. and Pittsburgh LATAs on either a three-year or a five-year basis.[1] The offering is open to customers ordering a minimum of 672 equivalent DSOs, which is equivalent to one DS3.[2] Some services and optional features are unavailable including alternate serving wire centers, pricing plans available to the Federal Communications Access Services, automatic loop transfer, and other types of offerings currently available under traditional special access. There are no nonrecurring charges associated with FMS; a recurring "administration fee" is assessed per DSO equivalency channel.

3. MFS Communications and Teleport Communications Group, Inc. filed petitions to reject or, alternatively, to suspend and investigate Bell Atlantic Transmittal No. 586.[3] MFS Communications and Teleport contend that Bell Atlantic's proposed rates and rate structure for FMS are anticompetitive, unreasonably discriminatory, inadequately supported by cost data, and otherwise violate the Commission's rules and policies. They submit that FMS does not provide new functionalities or service applications, but establishes a new pricing structure for DDS, voice grade, WATS, DS1 and DS3 services.[4] MFS also asserts that because the service would be offered only in Washington, D.C. and Pittsburgh, the tariff would establish unlawfully geographically deaveraged rates.[5]

4. In addition, MFS notes Bell Atlantic's assertion that to meet the Commission's cost test, it must simply demonstrate that Facilities Management Service can be offered at lower cost than equivalent special access services. MFS argues that the Commission's price cap rules require that LECs support a proposed new service with a traditional cost showing demonstrating that the proposed rates recover direct costs, plus an appropriate amount of overhead costs. In any event, MFS argues, the cost materials provided by Bell Atlantic are inadequate to justify the proposed rates under any standard. MFS argues that Bell Atlantic simply took existing DS3 channel termination and mileage rates and divided them by 672 (the number of DS0-equivalent channels that can be derived from a 45 Mbps DS3 transmission).[6] Further, MFS contends that the proposed service is unreasonably discriminatory. MFS argues that while Bell Atlantic treats FMS as a new service, it appears that the carrier has merely repriced existing special access service in order to establish preferential rates for selected customers on a LATA-specific basis. It also contends that the tariff is discriminatory because it does not allow collocators to cross-connect to FMS.[7]

5. Teleport also argues that Bell Atlantic's costing methodology violates Section 69.114 of the Commission's rules regarding pricing of special access, as well as the Commission's private line rate structure guidelines.[8]

6. Bell Atlantic responds that FMS permits it to optimize the configuration of special access circuits to minimize costs to the customer. It further asserts that the service can optimize the carrier's own interoffice facilities and multiplexing resources without the constraint of having to dedicate particular facilities to particular customers. In turn, Bell Atlantic contends, the efficiency of its network is improved and utilization of its facilities is increased so as to increase network capacity without additional capital expenditure. As a result of these efficiencies, Bell Atlantic argues, it is able to charge lower rates for FMS than for traditional special access.[9]

7. In response to MFS, Bell Atlantic contends that FMS rates are not geographically deaveraged but that the tariff sets forth a single set of rates for FMS, applicable regardless of where the service is available in Bell Atlantic's territory. Bell Atlantic submits that it intends to expand the offering to additional LATAs.[10] In response to Teleport, Bell Atlantic argues that FMS fits within the structure prescribed by

[1] Bell Atlantic has indicated it will now offer FMS in all of its remaining LATAs. In addition, Bell Atlantic has since revised Transmittal 586 to offer FMS on a month-to-month basis with a one-year minimum service period. Bell Atlantic Transmittal No. 609, November 16, 1993.

[2] Bell Atlantic has since revised Transmittal 586 to reflect that, while FMS will initially only be offered with a DS3 interface, it will be available with only an interface or with a 24 channel minimum by May 17, 1994. Bell Atlantic Transmittal No. 609, November 16, 1993.

[3] In addition, Cable and Wireless Communications, Inc. submitted a letter in support of FMS on September 8, 1993.

[4] MFS Petition at 2-3.

[5] *Id.* at 4-5.

[6] *Id.* at 5-12.

[7] *Id.* at 12-15.

[8] *Id.* at 3-4.

[9] Bell Atlantic Opposition at 3.

[10] *Id.* at 5-6.

Section 69.114, and that it does not violate the private line rate structure guidelines.[11] Further, Bell Atlantic contends that FMS complies with the Commission's cost support and pricing rules. It submits that contrary to the contention of MFS, the costs derived for any special access service are based on representative or averaged costs for the service within the study area, and not on the exact configuration of every instance in which the service is actually provided. Accordingly, Bell Atlantic argues, the FMS cost showing is properly based on a representative FMS service package.[12] Bell Atlantic also contends that it did not simply divide DS3 mileage charges by 672, as claimed by MFS, but argues that the mileage rates were based on the current mixture of special access mileage units in the network.[13]

8. In addition, Bell Atlantic contends that FMS is not unjustly or unreasonably discriminatory because FMS and traditional special access services are not "like" services. Bell Atlantic contends that from the customer's perspective, FMS is distinctive because it offers the customer no control over the configuration of its network. Further, Bell Atlantic submits that the customer's network may be subject to occasional disruptions as Bell Atlantic rearranges the customer's circuits, and that the tariff restricts the additional features and services that the customer can combine with FMS. It argues that because these disadvantages are matched by a lower price for FMS, there is no discrimination under Section 202(a) of the Communications Act. Bell Atlantic further submits that while it may be true that it can rearrange customer services to optimize its own network, customers can and do currently specify particular routes and media for their dedicated special access facilities.[14]

9. With respect to collocators, Bell Atlantic notes that its tariff does not prohibit collocators from purchasing FMS for a qualifying interoffice facilities network in a LATA. Bell Atlantic asserts, however, that for the intended efficiencies of FMS to materialize, the customer must have a significant Bell Atlantic-supplied interoffice network subtending the entrance facility for its primary premises. It contends that this is unlikely to be the case with a collocating competitive access provider (CAP) because the rationale of that provider's business is to substitute its own interoffice facilities for those of Bell Atlantic. As a result, Bell Atlantic submits, the CAP will probably not have Bell Atlantic-supplied interoffice facilities for Bell Atlantic to manage.[15]

10. We have reviewed both transmittals and all associated pleadings. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to require rejection, and that no question has been presented that warrants investigation at this time.

11. Accordingly, IT IS ORDERED that the petition to reject or to suspend and investigate Bell Atlantic Tariff F.C.C. No. 1, Transmittal No. 586, filed by MFS Communications IS DENIED.

12. IT IS FURTHER ORDERED that the petition to reject or to suspend and investigate Bell Atlantic Tariff F.C.C. No. 1, Transmittal No. 586, filed by Teleport Communications Group, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Acting Chief, Common Carrier Bureau

[11] *Id.* at 8-9.
[12] *Id.* at 10-16.
[13] *Id.* at 16.
[14] *Id.* at 18-21.
[15] *Id.* at 6-7. Bell Atlantic has since revised Transmittal 586 to make FMS available to interconnectors.

Before the
Federal Communications Commission
Washington, D.C. 20554

ET Docket No. 92-298

In the Matter of

Amendment of the Commission's
Rules to Establish a Single AM
Radio Stereophonic Transmitting
Equipment Standard

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 25, 1993; Released: November 23, 1993

By the Commission:

INTRODUCTION

1. By this action, the Commission adopts a standard for stereophonic AM broadcast radio service, specifically, the Motorola C-Quam system. Our establishment of an AM stereo standard is intended to remove any remaining uncertainty among AM broadcasters as to which stereo system to use and thereby encourage the improvement and expansion of AM broadcast service. This action responds to Section 214 of the Telecommunications Authorization Act of 1992 (Authorization Act), which requires the Commission to adopt a single AM broadcasting stereo transmission standard.[1]

BACKGROUND

2. In 1982 the Commission authorized AM stations to offer stereo service.[2] At that time, the Commission declined to select a single system standard from among the five competing AM stereo technical systems.[3] Rather, the Commission concluded that it would be more effective and efficient to allow market forces to determine the course of AM stereo development. Shortly afterwords, the field of competition narrowed to two systems: the Motorola "C-Quam" system and the Kahn system.[4] Some of the Harris AM stereo systems sold before the Harris Corporation dropped out of the competition also remain in service.

3. On October 27, 1992, the President signed the Authorization Act into law. Section 214 of the Authorization Act states that the Federal Communications Commission shall:

> (1) within 60 days after the date of enactment of this Act, initiate a rulemaking to adopt a single AM radio stereophonic transmitting equipment standard that specifies the composition of the transmitted stereophonic signal; and
>
> (2) within a year after such date of enactment, adopt such a standard.

4. On December 10, 1992, in response to the Authorization Act, the Commission adopted a *Notice of Proposed Rule Making* (*Notice)* in this proceeding which proposed to adopt the Motorola C-Quam system as the AM stereo standard.[5] Comments and/or replies responding to the *Notice* were filed by 27 parties.

DISCUSSION

5. In the *Notice,* we proposed to adopt the Motorola C-Quam system as the AM stereo standard in view of the fact that this system appears to have become the *de facto* choice of the market. We observed that this system has become by far the predominant choice of AM stations choosing to convert to stereo, there are large numbers of existing receivers capable of decoding only C-Quam and receivers for other systems are generally unavailable.[6] We also noted that the Motorola system has been adopted as the national standard in six other countries,[7] while none had adopted the Kahn system. We further indicated our belief that selection of an alternative system as the standard would set back the clock on the implementation of AM stereo service. We therefore stated that proponents of alternative systems would bear a heavy burden to show that the potential benefits of an alternate technology would outweigh the likely costs and delays of selection of a standard different than the Motorola system. Nevertheless, we invited submission of alternatives to the proposed standard.

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[1] *See* Telecommunications Authorization Act of 1992, P. L. No. 102-538. This proceeding is limited to issues involved in implementation of Section 214 of the Authorization Act. Other provisions of the Authorization Act are being addressed elsewhere.

[2] *See Report and Order* in Docket No. 21313, adopted March 4, 1982, 47 FR 13152.

[3] The developers of these AM stereo systems were Belar Electronics Corp., Harris Corporation, Kahn Communications, Inc./Hazeltine Corporation (the Kahn system), Magnavox Corporation, and Motorola Corporation.

[4] In 1988, the Commission reaffirmed its earlier decision not to select an AM stereo standard. In that action, the Commission noted that the market appeared to be working towards establishing a *de facto* standard. *See Memorandum Opinion and Order,* 3 FCC Rcd 403 (1988).

[5] *See Notice of Proposed Rule Making,* 3 FCC Rcd 688 (1993).

[6] In the *Notice* we observed that, of the approximately 660 US AM broadcasting stations that have converted to stereo operation, 591 use the Motorola system, an additional 37 use the Harris C-Quam compatible system, and somewhat fewer than 20 employ the Kahn system. We further noted that there are approximately 24 million C-Quam receivers currently in use, and that approximately 280,000 multi-system receivers were manufactured in the mid-80s. Multi-system AM stereo receivers are no longer produced. These statistics were taken from testimony and comments to the Hearing before the Subcommittee on Communications of the Committee on Commerce, Science, and Transportation, United States Senate, March 11, 1992, S. Hrg. 102-740. *See,* in particular, the Prepared Statement of Bruce Ladd, Vice President of Government Affairs and Government Relations, Motorola, Inc.

[7] Other countries adopting the Motorola system as their AM stereo standard include Canada, Mexico, Australia, Brazil, South Africa, and Japan.

We also proposed to require stations currently employing the Kahn or Harris stereo systems to discontinue operations with those systems within one year of the effective date of the new rules. We sought comment on the degree of compatibility of the Harris system with the C-Quam system and whether stations using that system should be permitted to continue to do so indefinitely.

6. *Selection of the AM Stereo Standard.* The National Association of Broadcasters (NAB), the Consumer Electronics Group of the Electronic Industries Association (EIA/CEG), the majority of broadcast equipment manufacturers who filed comments,[8] and others,[9] strongly support our proposal to select the Motorola C-Quam system as the AM stereo standard. Motorola states that the proposed action is consistent with Congress' expressed legislative intent to advance AM stereo service, and that adoption of the C-Quam system as the standard will benefit AM listeners by encouraging the availibility of more AM stereo receivers and transmitting facilities, thereby providing the public with higher quality AM broadcasts.

7. The NAB agrees with our observation that only the Motorola system has achieved any significant market penetration. It observes that the adoption of the same system in this country as has been adopted in other countries, particularly Japan, will allow economies of scale to be realized by commercial manufacturers with benefits for all broadcasters and consumers. The NAB and the EIA/CEG state that the greater certainty provided by the Commission's selection of a single system for AM stereo will be welcome by both broadcasters and consumer receiver manufacturers. The EIA/CEG maintains that receiver manufacturers and broadcasters heretofore have been fearful of guessing wrong in selecting among competing AM stereo technologies. The EIA/CEG further points to the success of the adoption of the Motorola system as the standard in Japan in encouraging the wide availability of AM stereo reception capabilities there in both auto and home receivers from a variety of manufacturers.

8. Comments opposing the selection of the C-Quam system were submitted by the two principal proponents of the Kahn system, Leonard R. Kahn and the Hazeltine Corporation (Hazeltine), as well as several broadcast consulting engineering firms and individual consultants and broadcast station engineers. Kahn maintains that the Motorola system exhibits serious technical flaws, including "platform motion",[10] loss of coverage, and increased interference to neighboring adjacent channel stations. A number of parties from the broadcast engineering community[11] echo Kahn's assertion that the Motorola system exhibits technical flaws, and further assert that the Kahn system has been demonstrated to be technically superior to the Motorola system. Several parties[12] suggest that further testing of of the competing systems is necessary to determine the relative technical merits before a decision on a standard is made.

9. Several parties, including Capital Cities/ABC, Inc. (Cap Cities/ABC), Hershberger, and James Dorrence, assert that the selection of an AM stereo system should be based primarily on technical considerations and that the Commission should choose a standard that would implement the best possible technology. These parties generally argue that the Commission should investigate other alternatives to the Motorola and Kahn systems. Cap Cities/ABC favorsadoption of a standard broad enough to allow for the play of competitive forces to foster quality improvements. Hershberger favors a linear independent sideband system as the ultimate standard, with the Kahn system as an interim standard. Dorrence recommends a single-sideband system and presents performance goals for such a standard.

10. Kahn challenges Motorola's market share statistics, arguing that Motorola's market share was captured by unfair competition, and that the Commission should discount the current use of the Motorola system as a true indication of market acceptance. Kahn also claims that the Commission may not adopt the Motorola system as the AM stereo standard without obtaining and reviewing the documents submitted (but then voluntarily withdrawn) by Kahn regarding allegations of antitrust activities.[13] Hazeltine echoes Kahn's anticompetitive charges against Motorola. In this

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[8] These parties include Motorola, Inc., Broadcast Electronics, Inc. (BE), Delta Electronics, Inc. (Delta), and Harris Corporation's Harris Allied Broadcast Division (Harris).

[9] Peter Kraushar and Paloma Blanca Radio, Ltd. (Paloma).

[10] "Platform motion" is a term used to describe a deterioration of the received signal under weak signal, multipath, or interference conditions which manifests itself as a shifting of the stereo image between the two channels in an uncontrolled and unpredictable manner.

[11] The parties claiming the technical superiority of the Kahn system are: Communications Technologies, Inc. (CTI), David L. Hershberger, Lee Sutherland Parr, David H. Solinske, Rich Wood, John E. Morris, Warren G. Smith, and Titus Technological Laboratories (Titus).

[12] Parties suggesting further testing are: Philip E. Galasso, Hazeltine, Kahn, Smith, Solinske, Jules Cohen & Associates (Cohen), E. Harold Munn, Jr., Cohen Dipell and Everist (CDE), Christopher Hayes, Steven L. Karty, and Philip J. Lerza.

[13] These anticompetitive allegations against Motorola were the subject of a request by Kahn that the Commission consider, but withhold from public disclosure, certain documents that were originally appended to Kahn's comments and reply comments, but then returned to Kahn at his request. The documents at issue were obtained in the course of discovery in a separate judicial proceeding between Kahn and Motorola that is pending in the Eastern District of New York. Because the documents are subject to a confidentiality order issued by the court, Kahn requested an "advance ruling" that the documents (which are not before the Commission and have not been reviewed by the Commission) would be afforded confidential treatment once filed with the Commission. By letter dated August 10, 1993, the Chief Engineer determined that, under the Freedom of Information Act (FOIA), the Commission could not guarantee that the documents at issue would be withheld from public inspection simply because they are the subject of a confidentiality order to which the FCC was not a party. Kahn argues, in an application for review, that the Chief Engineer erred in denying its request for an advance ruling that the documents would be kept confidential. Specifically, Kahn asserts that the documents at issue should be afforded confidential treatment under FOIA Exemption 4, 5 U.S.C. § 552(b)(4), and the legal precepts set forth in *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992) (en banc), *cert. denied*, 113 S. Ct. 1579 (1993). In *Critical Mass*, the court afforded categorical protection under exemption 4 to any information that is voluntarily submitted to an agency and not customarily disclosed to the public by the submitter. In this connection, Kahn argues that the Commission should presume that the parties to the Kahn-Motorola judicial proceeding "would 'customarily' obey the judicial non-disclosure orders." We need not determine whether Kahn is correct

regard, Hazeltine argues that the broadcasters who have converted to stereo, equipment manufacturers, and radio purchasers have not, as the Commission indicated in the *Notice*, expressed a preference for the Motorola system because they did not have a free choice among alternatives. Hazeltine alleges that this lack of choice sprang from manipulation of the receiver stereo decoder integrated circuit industry by Motorola.

11. Kahn proposes that the Commission select the Kahn system as the standard, allow Kahn Communications, Inc., to provide conversion kits to stations currently employing Motorola or Harris equipment, and allow broadcasters to transmit either a 15 Hz or 25 Hz pilot tone.[14] Kahn contends that this proposal, which he describes in an *ex parte* presentation[15] as a "win - win solution," would accommodate all broadcasters who have invested in stereo transmitting equipment and provide acceptable, if not true stereo, reception on existing stereo receivers that are not designed for the Kahn system.

12. We continue to believe that the Motorola C-Quam system is the appropriate choice for the AM stereo standard. This system has proven to be technically acceptable for providing excellent quality AM stereo service at a price that is affordable to both broadcasters and consumers. We disagree with Kahn and other opposing parties that the Motorola system has serious technical deficiencies. With regard to the claim that the Motorola system suffers from platform motion and reduced coverage, we observe that recent improvements in receiver design mitigate such effects.[16] Moreover, we note that the alleged technical deficiencies of the Motorola system are largely related to weak signal reception that occurs beyond a station's protected service area and are therefore irrelevant. Moreover, we note that the Motorola and Kahn systems have been tested and comparatively evaluated extensively over the years, including recent tests conducted by other nations considering adoption of a standard. Both systems have technical advantages and disadvantages. We have no reason to expect that further testing would reveal any new information. Moreover, any further testing would surely lead to additional delays. Congress has made clear its intent that we bring this matter to a prompt resolution as indicated by the statutory time restrictions on this proceeding.

13. We reject the premise that our decision on an AM stereo standard should be based solely on technical performance, particularly at this relatively late stage of the implementation of AM stereo. We believe it is entirely appropriate that we take into account the strong preference demonstrated in the market place for the Motorola system. We note that the market place takes into account not only technical parameters, but also other factors such as subjective performance, costs of broadcasters' initial conversion to stereo, reliability, service, ease of receiver design and performance, etc. We also believe it is incumbent upon us to consider the sunk costs in existing stereo transmission equipment, compatibility with millions of existing envelope detector receivers, and availability of compatible stereo receivers, as well as the potential for obsoleting the public's investment in existing stereo receivers. In this regard, we find that selection of a system other than Motorola's would result in substantial costs to broadcasters and consumers, and thus would be detrimental to the expansion of AM stereo service. We also do not agree that we should seek development of alternatives to the Kahn and Motorola systems. To do so would introduce significant delay and confusion without any assurance that a significantly better alternative could or would be forthcoming.

14. We observe that while Kahn challenges Motorola's market penetration statistics, no alternative information is provided.[17] Kahn's contention that the limited penetration of AM stereo to date represents a rejection of the Motorola system by the majority of the AM broadcast industry is simply convoluted logic. To properly draw such a conclusion, it would be necessary to demonstrate that Motorola controlled the market for AM stereo and that its system was so inferior that broadcasters simply chose to do without AM stereo rather than accept the Motorola technology. Neither of these premises appears correct. It is obvious that other factors, such as a station's decision whether to convert to stereo at all because of the nature of its program-

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in claiming that the documents are entitled to protection under FOIA Exemption 4 and *Critical Mass*. Even if the documents were entitled to such protection, the Commission, in accordance with its rules, cannot guarantee in advance that public interest considerations presented in a subsequent FOIA request would not warrant disclosure of the documents at issue. *See* 47 C.F.R. §§ 0.459(b); 0.461(f)(4). We further note that, because the Commission is not a party to the confidentiality order issued by the court, the order does not bind the Commission and thus is not a basis for denying an FOIA request for the documents at issue. Accordingly, we find that the Chief Engineer's denial of the confidentiality request was appropriate and affirm that decision.

[14] These pilot tones cause the stereo indicator light to illuminate on an AM stereo receiver and activate the stereo decoder circuitry. A 15 Hz pilot tone will activate the decoder circuitry on a receiver designed to receive the Kahn system, and a 25 Hz tone will activate the decoder circuitry on a receiver designed to receive the Motorola system.

[15] *See Ex Parte* presentation of Leonard R. Kahn, June 19, 1993.

[16] Receivers can compensate for platform motion by reducing the channel separation under weak signal conditions. Reduction in coverage area can be eliminated by designing the receiver to smoothly transition to monaural operation when signals are weak.

[17] Although the market statistics cited in the *Notice* were taken from Motorola testimony to the US Senate Subcommittee on Communications, and their accuracy has been challenged by Kahn and others, they constitute the only tabulations of current AM station stereo operation and stereo receiver production that were available at the time of the drafting of the *Notice*. Motorola's statistics on C-Quam conversions are, according to their reply comments, based on mail surveys in 1988 and 1991 that were subsequently updated by telephone contacts. The statistics on the use of other systems are based on telephone surveys. Motorola's estimates of receiver production are based on manufacturers reports of decoder IC units shipped. Motorola admits that it is difficult to track how many of the receivers produced worldwide have been shipped to the US, but estimates that 2 to 4 million have been consumed in the Japanese home market. Motorola argues that its estimates are conservative and frequently updated. Motorola's figures remain the only data available, and, despite unsupported challenges to their accuracy, no party to this proceeding has produced alternative statistics indicating substantial errors in Motorola's data. Kahn claims to have sold 200 Kahn system stereo exciters, but offers no evidence as to how many are currently in use in stereophonic operation. He also notes the presence of the Kahn system pilot tone on eleven New York City stations, but absent any identification of these stations in Kahn's comments, there is no way to determine whether the stations are broadcasting in stereo or are using Kahn exciters in a monophonic mode of operation.

ming, economic considerations, or general uncertainty about which stereo system to use have affected AM stations' decisions on implementing stereo service. Based on the materials in the record, we are not persuaded that Motorola unfairly manipulated the marketplace to deny any segment of industry or the public a free choice. Further, we disagree with Kahn's contention that the Commission may not adopt the Motorola system standard without obtaining and reviewing the documents submitted (but then voluntarily withdrawn) by Kahn regarding allegations of antitrust activities. Allegations of anticompetitive behavior most commonly arise in the context of considering the character qualifications of mass media licensees and applications for license. In that context, we indicated that we would generally consider only adjudicated violations of antitrust or anticompetitive laws.[18] We determined further that we would consider mere allegations of "non-FCC" misconduct, such as allegations of anticompetitive practices, in circumstances in which the alleged conduct is so egregious as to shock the conscience.[19] In this case, Kahn's allegations of anticompetitive activities by Motorola are already the subject of a separate judicial proceeding. We believe it is inappropriate for the Commission to separately adjudicate these matters, which fall within the expertise of the court. Moreover, Kahn's allegations do not rise to the level of egregiousness that would warrant our independent investigation of these anticompetitive charges. Rather, to the extent Kahn (or others) believe that any adjudications by the court in the litigation are relevant, he may bring the adjudication to our attention for consideration of whether any possible Commission action at that time is warranted.[20]

15. We are also not persuaded that Kahn's proposed plan for implementing his system presents any advantages to the AM broadcast industry or the listening public. As indicated above, we are not persuaded that the Kahn system would constitute a better choice than the Motorola system even if there were no embedded base of AM stereo equipment. We also agree with Motorola[21] [22] that attempting to force C-Quam receivers to decode Kahn system signals by transmitting the 25 Hz pilot will likely cause degraded reception and will certainly cause loss of true stereo imaging. This would unacceptably and unfairly penalize the millions of consumers who have purchased C-Quam receivers.

16. We believe that the past nearly twelve years of unrestricted competition between the systems has given the public and the broadcast and receiver industries the opportunity to weigh the known technical performance considerations against other factors and to make appropriate personal and business decisions. We find that there has indeed been a convergence in the marketplace during these years toward the Motorola C-Quam system. Based on the overwhelming marketplace preference for the Motorola C-Quam system, and the long history of tests of this system, we believe the Motorola system will provide excellent AM stereo service. Accordingly, we conclude that the public interest is best served by adopting the Motorola C-Quam system as the AM stereo standard.

17. *Receiver Standards.* Several of the commenting parties, including Cap Cities/ABC, CDE, CTI, Dorrence, and Morris, argue that, in order for this proceeding to have a positive effect on the state of the AM broadcast service, the Commission must not only specify a transmitting standard for AM stereo, but must also set standards for receiver performance. The EIA/CEG points out, however, that the Authorization Act does not address the design of AM radio receivers. In its reply comments, the EIA/CEG further maintains that comments requesting receiver standards are beyond the scope of this proceeding, and points out that the Commission has previously rejected proposals to regulate AM receiver characteristics. The NAB acknowledges the our encouragement of the availability of high-quality receivers expressed in the *Notice*, and urges that we continue to expand our AM improvement efforts in conjunction with the ongoing efforts of broadcasters and receiver manufacturers.

18. We agree with the EIA/CEG that regulation of receivers is beyond the scope of this proceeding. Proposals for such regulation have been previously fully explored in past rule makings, and the Commission has chosen to continue to let the marketplace set AM receiver standards.[23] We recognize the receiver industry's efforts to date to improve the quality of AM receivers, and will continue to encourage receiver manufacturers to develop and market receivers that comply with the AMAX standards and certification program developed jointly by the NAB and EIA/CEG.[24]

19. *Harris System Compatibility with C-Quam and Transition Period.* As indicated above, we proposed a one-year transition period for implementation of the new standard. We also sought comments on whether stations employing the Harris system were sufficiently compatible with C-Quam to continue using the Harris system indefinitely. BE

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[18] *See Report, Order and Policy Statement Regarding Character Qualifications in Broadcast Licensing (Character Policy Statement)* , 102 F.C.C. 2d 1179, 1204-1205 (1986), *recon. denied*, 1 FCC Rcd. 421, 422 (1986).

[19] *See Character Policy Statement*, 102 F.C.C. 2d at 1205 n.60. Although the selection of an AM stereo standard is not a licensing proceeding, we believe it is not appropriate to establish here a separate and different set of principles to examine Kahn's allegations. Thus, we have considered Kahn's anticompetitive charges against Motorola under the guidance established in our policy statements regarding broadcasters' character.

[20] On October 8, 1993, Mr. William Malone, attorney for Mr. Kahn, transmitted a copy of a memorandum decision of Judge Arthur D. Spatt in Mr. Kahn's suit against Motorola before the Eastern District of New York. Judge Spatt's decison, dated October 5, 1993, resolves motions filed by Motorola, Hazeltine Corporation, and Emerson. After reviewing this filing, we have concluded that it provides no grounds to change our determination in the instant AM stereo proceeding.

[21] *See Ex Parte* presentation of Motorola, Inc., August 12, 1993.

[22] On October 14, 1993, Motorola filed a pleading entitled "Response of Motorola, Inc." responding to filings by Leonard Kahn and David Solinske with regard to tape recorded comparisons of the Kahn and C-Quam systems as received on a Motorola-type decoder. On October 20, 1993, Kahn responded to this pleading and filed a "Response to Motorola's October 14, 1993, Supplemental Filing." Because these pleadings were filed late in this proceeding, we did not have the opportunity to evaluate the arguments presented therein.

[23] *See Report and Order*, MM Docket No. 87-267, 6 FCC Rcd. 6273, 6338-39 (1991). *See also Memorandum Opinion and Order*, MM Docket No. 87-267, 8 FCC Rcd. 3250, 3256-57 (1993).

[24] AMAX-certified receivers must comply with specified bandwidth and distortion standards to ensure high-fidelity reception capability, have adjustable bandwidth settings, and be capable of tuning the expanded portion of the AM band from 1610 to 1700 kHz.

argues that the Commission should mandate full compliance with the C-Quam standard and believes the one year transition period proposed is adequate to allow broadcasters time to finance purchase of new equipment. It maintains that, even with modifications, the Harris AM stereo signal is not fully compatible with C-Quam receivers and results in higher audio distortion when received on C-Quam radios. Motorola and Harris, on the other hand, state that full conversion of Harris equipment to the C-Quam standard is both feasible and desirable. Motorola suggests a more flexible transition period of at least one year but not more than two years. Hershberger maintains that field experience has demonstrated that the Harris system is adequately compatible with the Motorola system, and that broadcasters using the Harris system should be allowed to continue to do so because it would encourage the development of synchronous detection AM receivers.

20. Because of the relatively small number of Harris systems in operation, we do not agree that allowing them to continue to operate without conversion to C-Quam will significantly encourage development of synchronous detection receivers or have any other positive impact on the AM broadcast service. We agree with BE, Harris, and Motorola that the public interest will be best served by mandating full compliance with the C-Quam standard. We note the clear Congressional mandate to adopt a single AM stereo transmitting standard and therefore feel that it is important that all broadcasters comply with that standard. We further note the lack of any specific opposition from broadcasters employing alternative systems to our proposed transition schedule. Accordingly, we are requiring stations that employ alternative systems for stereo operation to discontinue such operation as of one year from the effective date of these rules.

21. *Kahn "POWER-side" Operation.* Several parties express concern over the continued acceptability under our rules of operating using the Kahn POWER-side AM single-sideband system. POWER-side operation, as distinct from Kahn stereo operation, involves modulating an AM transmitter with two independent sidebands, containing identical program material, but with intentional level and frequency response differences. This system is implemented with a Kahn independent sideband stereo exciter and is claimed to have certain advantages for reception with monophonic receivers, particularly in adjacent-channel interference situations. CTI and Furr argue that adoption of the proposed standard would prohibit such an implementation. Motorola maintains that the Kahn POWER-side mode of operation is not stereophonic and questions its legality under the present rules.

22. Our AM rules do not include a definition of the term "stereophonic." However, generally accepted definitions of stereo service infer two or more channels of audio information designed to produce an audio "image" when demodulated by an appropriate receiver. On this basis, we find that stations employing the Kahn POWER-side system are not subject to the provisions of the stereophonic transmitting standard adopted herein and may continue to be operated, provided that the program material fed to both channels of the exciter is identical in content.

23. *Compatibility with Subcarrier Systems and Future Digital Audio Radio.* Black River Broadcasting and Paloma raise concerns about the extent to which the Motorola C-Quam system is compatible with future ancillary subcarrier systems such as utility load management and metering systems and paging systems. CTI maintains that the Motorola system is not likely to be compatible with future in-band, on-channel digital audio radio systems. We agree with Motorola that there is no reason to believe that the C-Quam system, the Kahn system, or any other existing system would have any advantage in compatibility with future ancillary subcarrier systems or future digital transmission systems for the AM radio service. Moreover, as we have no specific information on the likely design of such systems, we could not presuppose to consider fairly issues relating to their compatibility with AM stereo technologies.

24. *Excessive Bandwidth Allegations.* Hershberger alleges that the Motorola C-Quam system violates the bandwidth criteria specified in Section 73.44 of the Commission's Rules under program conditions. His allegations are based on his own interpretations of proper bandwidth measurement techniques which differ from the measurement procedures specified in Sections 73.44(a) and 73.128(b)(1) of the rules[25] and the Commission's own interpretations of these procedures which have historically been consistently applied since the inception of AM stereophonic service. We find no evidence that currently authorized C-Quam equipment violates the Commission's bandwidth requirements when properly operated. Further, we note that all AM stations must comply with the emission limitations which were developed by the National Radio Systems Committee specified in Section 73.44 of our rules.

25. *Signal Monitoring and Tolerance Issues.* In its comments, Delta suggests three modifications to the proposed AM stereo rules: 1) that proposed rule section 73.128(c)(5) be clarified to state that the maximum phase excursion is a limit that is not to be exceeded and that, therefore, the necessary measuring equipment must always be present and operating, 2) that the pilot injection level should be specified as nominally 5% with a tolerance of +1%, -1%, and 3) that the maximum total harmonic distortion specification of 1% for the pilot tone, being unduly restrictive, be increased to 3%.

26. With regard to Delta's first proposal, we do not agree that there is a need to clarify the proposed rule language. The phase excursion parameter is identified as a maximum value not to be exceeded, and 73.128(a) clearly requires installation of necessary monitoring equipment to determine that the transmissions conform to the modulation characteristics specified. Accordingly, we are not adopting this suggested change. We do, however, agree that it is impractical to specify the pilot injection level without any tolerance specification. We also agree that, in the absence of complaints about audibility of harmonics from existing equipment with higher distortion levels, the 1% specified maximum harmonic distortion is too restrictive. Motorola, from whose own internal standard these specifications were adapted, has not raised any objection to these proposed changes in its reply comments. We will therefore specify the pilot injection level at 5% with a tolerance of +1%, -1%, and the maximum total harmonic distortion of the pilot tone at 3%.

27. *Pilot Tone Protection.* Motorola suggests that we establish a region of the spectrum within 5 Hz on either side of the 25 Hz C-Quam pilot tone that is protected in a

[25] See 47 C.F.R. Sections 73.44(a) and 73.128(b)(1).

similar manner to the protection afforded stereo pilot tones in the FM broadcast service. Motorola does not provide any justification for this proposal in its submissions.

28. We have previously considered whether there was any need to protect AM stereo pilots in order to ensure signal quality, and concluded that broadcasters have a strong incentive to protect their own transmissions.[26] Because improper pilot frequency use can impair only the quality of the station involved, stations have a strong self-interest in making appropriate use of AM stereo pilots. Absent any information to the contrary, we do not find it necessary to reexamine our decision to decline to protect the pilot tones of AM stereo systems.

29. *Patent Licensing Policies.* As proposed in the *Notice*, we are conditioning the selection of Motorola's system as the AM stereo standard by requiring Motorola to license its patents to other parties under fair and reasonable terms.[27]

PROCEDURAL MATTERS

30. *Regulatory Flexibility Analysis.* The Final Regulatory Flexibility Analysis pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. Section 608, is contained in Appendix A.

ORDERING CLAUSES

31. Accordingly, IT IS ORDERED, that Part 73 of the Commission's Rules and Regulations IS AMENDED as specified in Appendix B, effective 90 days after publication in the Federal Register. IT IS FURTHER ORDERED, that this proceeding IS TERMINATED. This action is taken pursuant to Sections 4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 154(j), and 303(r), and Section 214 of the Telecommunications Authorization Act of 1992, Pub. L. 102-538 (1992).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

FINAL REGULATORY ANALYSIS

Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

I. Need and purpose of this action:

This action is taken to select an AM stereophonic transmitting equipment standard, as required under Section 214 of the Telecommunications Authorization Act of 1992.

II. Summary of the issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:

There were no comments submitted in response to the Initial Regulatory Flexibility Analysis.

III. Significant alternatives considered:

The *Notice of Proposed Rulemaking* in this proceeding proposed to adopt the Motorola C-Quam system as the AM stereophonic transmitting standard. This proposal was supported by the industry associations for the broadcast and receiver industries, most broadcast equipment manufacturers who commented, and others. Comments were received from the proponent of the other currently viable AM stereo system and supporters of that system, primarily from the broadcast engineering community, either supporting the alternative system or suggesting further testing to determine technical superiority and use of such superiority as the primary criterion for system selection. We determined that: marketplace convergence on a single system should remain the primary basis for the decision, as proposed, that all the technically viable systems had been adequately tested previously, that the Motorola system provides high quality service to the public, and that there is no indication that the available alternative systems are significantly superior, if at all.

[26] *See Memorandum Opinion and Order*, 3 FCC Rcd No. 2, 403, 405 (1988). *See also Report and Order* in MM Docket No. 83-1322, adopted June 27, 1984, 100 FCC 2d, 49 FR 34011.

[27] *See* FCC Public Notice, Revised Patent Procedures of the Federal Communications Commission, Public Notice 13948, December 6, 1961.

APPENDIX B

FINAL RULES

I. Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 73 - RADIO BROADCAST SERVICES

1. The authority citation in Part 73 continues to read:

AUTHORITY: 47 U.S.C. 154, 303.

2. Subpart A is amended by revising section 73.128 to read as follows:

Section 73.128 AM Stereophonic Broadcasting.

(a) An AM broadcast station may, without specific authority from the FCC, transmit stereophonic programs upon installation of type accepted stereophonic transmitting equipment and the necessary measuring equipment to determine that the stereophonic transmissions conform to the modulation characteristics specified in paragraphs (b) and (c) of this section. Stations transmitting stereophonic programs prior to *(insert date 90 days after publication in Federal Register)* may continue to do so until *(insert date one year plus 90 days after publication in Federal Register)* as long as they continue to comply with the rules in effect prior to *(insert date 90 days after publication in Federal Register)*. Stations using the Harris AM stereo system may continue to do so indefinitely as long as they continue to comply with the rules in effect prior to *(insert date 90 days after publication in Federal Register)*.

(b) The following limitations on the transmitted wave must be met to insure compliance with the occupied bandwidth limitations, compatibility with AM receivers using envelope detectors, and any applicable international agreements to which the FCC is a party:

(1) * * *

(c) Effective (insert date one year after enactment), stereophonic transmissions shall conform to the following additional modulation characteristics:

(1) The audio response of the main (L+R) channel shall conform to the requirements of the ANSI/EIA-549-1988, NRSC-1 AM Preemphasis/Deemphasis and Broadcast Transmission Bandwidth Specifications (NRSC-1).

(2) The left and right channel audio signals shall conform to frequency

response limitations dictated by ANSI/EIA-549-1988.

(3) The stereophonic difference (L-R) information shall be transmitted by varying the phase of the carrier in accordance with the following relationship:

$$\phi_c = \tan^{-1}\left(\frac{m(L(t)-R(t))}{1+m(L(t)+R(t))}\right)$$

where:

L(t) = audio signal left channel,
R(t) = audio signal right channel,
m = modulation factor, and
$m_{peak}(L(t) + R(t)) = 1$ for 100% amplitude modulation,
$m_{peak}(L(t) - R(t)) = 1$ for 100% phase modulation

(4) The carrier phase shall advance in a positive direction when a left channel signal causes the transmitter envelope to be modulated in a positive direction. The carrier phase shall likewise retard (negative phase change) when a right channel signal causes the transmitter envelope to be modulated in a positive direction. The phase modulation shall be symmetrical for the condition of difference (L-R) channel information sent without the presence of envelope modulation.

(5) Maximum angular modulation, which occurs on negative peaks of the left or right channel with no signal present on the opposite channel (L(t) = -0.75, R(t) = 0, or R(t) = -0.75, L(t) = 0) shall not exceed 1.25 radians.

(6) A peak phase modulation of +/- 0.785 radians under the condition of difference (L-R) channel modulation and the absence of envelope (L+R) modulation and pilot signal shall represent 100% modulation of the difference channel.

(7) The composite signal shall contain a pilot tone for indication of the presence of stereophonic information. The pilot tone shall consist of a 25 Hz tone, with 3% or less total harmonic distortion and a frequency tolerance of +/- 0.1 Hz, which modulates the carrier phase +/- 0.05 radians peak, corresponding to 5% L-R modulation when no other modulation is present. The injection level shall be 5%, with a tolerance of +1, -1%.

(8) The composite signal shall be described by the following expression:

$$E_c = A_c\left[1 + m\sum_{n=1}^{\infty} C_{sn}\cos(\omega_{sn}t + \phi_{sn})\right]\cos\left\{\omega_c t + \tan^{-1}\frac{m\sum_{n=1}^{\infty} C_{dn}\cos(\omega_{dn}t + \phi_{dn}) + .05\sin 50\pi t}{1 + m\sum_{n=1}^{\infty} C_{sn}\cos(\omega_{sn}t + \phi_{sn})}\right\}$$

where:
A = the unmodulated carrier voltage
m = the modulation index
C_{sn} = the magnitude of the nth term of the sum signal
C_{dn} = the magnitude of the nth term of the difference signal
ϖ_{sn} = the nth order angular velocity of the sum signal
ϖ_{dn} = the nth order angular velocity of the difference signal
ϖ_c = the angular velocity of the carrier

ϕ_{sn} = the angle of the nth order term = $\tan^{-1}\left[\frac{B_{sn}}{A_{sn}}\right]$

ϕ_{dn} = the angle of the nth order term = $\tan^{-1}\left[\frac{B_{dn}}{A_{dn}}\right]$

A_{sn} and B_{sn} are the n^{th} sine and cosine coefficients of C_{sn}
A_{dn} and B_{dn} are the n^{th} sine and cosine coefficients of C_{dn}

APPENDIX C

List of Commenting Parties

Comments

Broadcast Electronics, Inc.
Capital Cities/ABC, Inc.
Cohen, Dippell, and Everist, P. C.
Communications Technologies, Inc.
Delta Electronics, Inc.
James Dorrence
Electronic Industries Association/Consumer Electronics Group
John R. Furr
Philip E. Galasso
Harris Corporation - Harris Allied Broadcast Division
Christopher Hayes
David L. Hershberger
Leonard R. Kahn
Peter Kraushar
Motorola, Inc.
National Association of Broadcasters
Paloma Blanca Radio, Ltd.
Lee Sutherland Parr
David H. Solinske

Reply Comments

Black River Broadcasting
Broadcast Electronics, Inc.
Capital Cities/ABC, Inc.
Jules Cohen and Associates
Cohen, Dippell, and Everist, P. C.
Electronic Industries Association/Consumer Electronics Group
Leonard R. Kahn
John E. Morris
Motorola, Inc.
Harold Munn, Jr.
Warren G. Smith
Titus Technological Laboratories
Rich Wood

Additional or Supplemental Comments

Leonard R. Kahn
Steven L. Karty
Philip J. Lerza
Motorola, Inc.
David H. Solinske

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-296

In the Matter of

Quadras, Inc.

Licensee of Station KDEW(AM)
Dewitt, Arkansas

Order to Show Cause Why the
License for Station KDEW(AM)
Dewitt, Arkansas Should
Not be Revoked

ORDER TO SHOW CAUSE
AND
HEARING DESIGNATION ORDER

Adopted: November 4, 1993; Released: November 23, 1993

By the Chief, Audio Services Division:

1. The Chief, Audio Service Division, Mass Media Bureau, has before him for consideration: (a) the license held by Quadras, Inc. ("Quadras") for Station KDEW(AM), Dewitt, Arkansas; and (b) the results of an investigation into KDEW(AM)'s silent status.[1]

2. The Commission's records indicate that KDEW(AM) has been off the air since June 25, 1991. William R. Harris acquired control of KDEW(AM)'s licensee, Quadras, on October 20, 1988 (BTC-880531EE, granted August 9, 1988). KDEW(AM)'s license expires on June 1, 1996 (BR890328UN, granted May 24, 1989). The licensee's last request for authority to remain silent was granted through October 1, 1993 by letter, dated July 1, 1993, from the Chief, AM Branch, Audio Services Division, Mass Media Bureau. In that letter, Quadras was advised that any future requests for authority to remain silent must be accompanied by a detailed summary of steps being taken to return KDEW(AM) to on-air operations.

3. Quadras has not requested further authority to remain silent, and it appears that no substantial progress has been made by Quadras to return KDEW(AM) to the air. Because Quadras has not demonstrated that causes beyond its control prevent it from resuming broadcast operations, Quadras is in apparent violation of Sections 73.1740(a)(4)of the Commission's Rules.[2] Because of the protracted period of time in which the station has been silent, and because Quadras apparently lacks the ability and/or intent to restore KDEW(AM) to broadcast status, Quadras is also in apparent violation of 73.1750 of the Commission's Rules.[3]

4. Accordingly, IT IS ORDERED, That pursuant to Section 312(a)(3) and (4) of the Communications Act of 1934, as amended, Quadras Radio, Inc. is DIRECTED TO SHOW CAUSE why the license for Station KDEW(AM) should not be REVOKED, at a hearing to be held at a time and location specified in a subsequent Order, upon the following issues:

(a) To determine whether Quadras, Inc. has the capability and intent to expeditiously resume broadcast operations of KDEW(AM) consistent with the Commission's Rules.

(b) To determine whether Quadras, Inc. has violated Sections 73.1740 and/or 73.1750 of the Commission's Rules.

(c) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether Quadras, Inc. is qualified to be and remain the licensee of Station KDEW(AM).

5. IT IS FURTHER ORDERED, That, pursuant to Section 312(d) of the Communications Act of 1934, as amended, both the BURDEN OF PROCEEDING with the introduction of evidence and the BURDEN OF PROOF with respect to the issues specified above shall be upon the MASS MEDIA BUREAU.

6. IT IS FURTHER ORDERED, That to avail it the opportunity to be heard, the licensee, pursuant to Section 1.91(c) of the Commission's Rules, SHALL FILE with the Commission within thirty (30) days of the receipt of this Order a WRITTEN APPEARANCE stating that it will appear at the hearing and present evidence on the matters

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[1] The Mass Media Bureau has been delegated authority to issue and release Show Cause Orders in cases involving silent broadcast stations. *See Debrine Communications, Inc.*, 7 FCC Rcd 2118 (1992).

[2] Section 73.1740(a)(4) provides:

"In the event that causes beyond the control of a licensee make it impossible to adhere to the operating schedule of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, D.C. not later than the 10th day of limited or discontinued operation. During such period, the licensee shall continue to adhere to the requirements in the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30 day period, the licensee will so notify the FCC of this date. If the causes beyond the control of the licensee make it impossible to comply within the allowed period, informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary."

[3] Section 73.1750 provides:

"The licensee of each station shall notify the FCC in Washington, D.C. of permanent discontinuance of operation at least two days before operation is discontinued. Immediately after discontinuance of operation, the licensee shall forward the station license and other instruments of authorization to the FCC, Washington, D.C. for cancellation."

specified in the Order. If the licensee fails to file a written appearance within the time specified, or within thirty (30) days of receipt of this Order the licensee files a written statement expressly waiving his right to a hearing, the licensee's right to a hearing SHALL BE DEEMED TO BE WAIVED. In the event the right to a hearing is waived, the Presiding Judge, or the Chief Administrative Law Judge if no Presiding Judge has been designated, SHALL TERMINATE the hearing proceeding and CERTIFY this case to the Commission in the regular course of business, and an appropriate Order shall be entered.[4]

7. IT IS FURTHER ORDERED, That, if it is determined that the hearing record does not warrant an Order revoking the license for KDEW(AM), Dewitt, Arkansas it shall be determined, pursuant to Section 503(b) of the Communications Act of 1934, as amended, whether an ORDER OF FORFEITURE shall be issued against the licensee in an amount not exceeding $250,000 for the willful and/or repeated violation of Section 73.1740 and/or 73.1750 of the Commission's Rules.

8. IT IS FURTHER ORDERED, That this document constitutes a NOTICE OF APPARENT LIABILITY for willful and repeated violation of Section 73.1740 and/or 73.1750 of the Commission's Rules. The Commission has determined that in every case designated for hearing involving the potential revocation of a station license, it shall, as a matter of course, include a forfeiture notice so as to maintain the fullest possible flexibility of action. Since the practice of including such forfeiture notice is a routine procedure, such inclusion here should not be viewed in any manner as suggesting or otherwise indicating what the initial or final disposition of this proceeding should be.

FEDERAL COMMUNICATIONS COMMISSION

Larry D. Eads, Chief
Audio Services Division
Mass Media Bureau

[4] The Mass Media Bureau has been delegated authority to issue Revocation Orders in cases involving silent broadcast stations. *See Radio Northwest Broadcasting Company*, 4 FCC Rcd 596, n.3 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

P.P.D. & G., Inc.
(Assignor)

and File No. BALCT-930217KK

Agape Church, Inc.
(Assignee)

For Consent to Assignment of
the License of KRZB-TV, Channel 26,
Hot Springs, Arkansas

MEMORANDUM OPINION AND ORDER

Adopted: November 16, 1993; Released: November 23, 1993

By the Commission:

1. The Commission has before it for consideration the unopposed application to assign the license of television station KRZB-TV, Channel 26, Hot Springs, Arkansas, from P.P.D. & G., Inc. ("PPD & G") to Agape Church, Inc. ("Agape"). Agape is the licensee of KVTN(TV) (Ind.), Channel 25, Pine Bluff, Arkansas. Because the predicted Grade B contours of KVTN(TV) and KRZB-TV overlap, the proposed assignment does not comply with Section 73.3555 (b) of the Commission's Rules. That rule prohibits the common ownership or control of television stations if the Grade B contours of the existing and proposed stations overlap. Agape intends, however, to operate KRZB-TV as a satellite of KVTN(TV) in accordance with the satellite exception to the duopoly prohibition set forth in Note 5 to Section 73.3555, which provides that the prohibitions of the section "will not be applied to cases involving television stations which are satellite operations."[1]

2. Under our satellite policy, *Television Satellite Stations*, 6 FCC Rcd 4212 (1991), an applicant for television satellite status is entitled to a presumption that the proposed satellite operation is in the public interest if it meets three criteria: (1) there is no City Grade contour overlap between the parent and the satellite; (2) the proposed satellite would provide service to an underserved area; and (3) no alternative operator is ready and able to construct or to purchase and operate the satellite as a full-service station. If an applicant cannot qualify for the presumption, we will evaluate the proposal on an *ad hoc* basis to determine whether a grant of the application is in the public interest.

3. In support of its request that KRZB-TV be permitted to operate as a satellite of KVTN(TV), the applicant contends that its proposal meets the three criteria for presumptive grant. First, the applicant notes, there is no overlap between the City Grade contours of stations KRZB-TV and KVTN(TV). Second, the Hot Springs area is underserved in terms of our "transmission test," since there is only one television station licensed to Hot Springs. Third, according to the licensee, KRZB-TV has been dark for nearly five years due to financial difficulties. During this time, PPD & G sought the help of a broadcast consultant and a real estate broker in an attempt to refinance or to sell the station. These efforts were not successful. The applicant also represents that the sparsely-populated core area served by KRZB-TV is subsumed under the Little Rock ADI. However, KRZB-TV does not provide competitive service throughout the Little Rock ADI, where it competes with twelve other stations. Consequently, the licensee asserts, the station is not attractive to buyers that would operate it independently.

DISCUSSION

4. With regard to the first criterion of the public interest presumption favoring satellite operation, the applicant has submitted an engineering study which demonstrates that the present predicted City Grade contours of KRZB-TV and KVTN(TV) do not overlap. Further, a pending application to modify the technical facilities of KRZB-TV, if granted, would not result in any City Grade contour overlap of the stations. The applicant thus satisfies the first criterion.

5. With respect to the second criterion, we have defined an "underserved area" as one in which there are two or fewer full-service stations licensed to the satellite's community of license, or, alternatively, one in which 25% or more of the area within the satellite's Grade B contour and outside the parent's Grade B contour receives four or fewer television services. *See Television Satellite Stations*, at 4215. In applying the former "transmission test," we note that, while there are two television channels allotted to Hot Springs, KRZB-TV and Channel 20, KRZB-TV is the only television station licensed to Hot Springs. Hot Springs is thus an "underserved area" and the operation of KZRB-TV as a satellite conforms to the second criterion.

6. With respect to the third criterion, PPD & G has had severe financial difficulties for some time, and KRZB-TV has been off the air for five years. Since acquiring the station and its heavy liabilities in 1987, the licensee made several attempts to upgrade its competitive position, including relocating its transmitter site and improving the station's facilities, but these improvements did not ameliorate its financial condition. After receiving Commission permission to suspend operations, PPD & G continued in its efforts to complete its new facilities, but its worsening financial condition culminated in its filing for protection under Chapter 11 of the Bankruptcy Code in 1988. After the financing intended to support PPD & G's plan of reorganization failed, PPD & G withdrew its petition for protection under the Bankruptcy Code. In early 1990, the

[1] We note that there is an outstanding proceeding concerning television satellite stations, which invites comment on whether television satellites should be exempted from the 12-station limit set out in the multiple ownership rules. *Second Further Notice of Proposed Rulemaking* in Docket No. 87-8, 6 FCC Rcd 5010 (1991). Grant of the application now before us will not implicate the twelve-station rule.

licensee engaged a broadcast consultant and a real estate broker to locate a potential purchaser for the station, but no potential purchasers came forward. In 1991, the broker's contacts with one interested party were abandoned, and despite continuing efforts to sell the station since then, Agape has been the only party to express interest in acquiring KRZB-TV. Based upon this showing, we conclude that no alternative buyer is willing and able to operate the station as a full-service station. Accordingly, the applicant has satisfied the third criterion.

CONCLUSION

7. In view of the above, we find that the proposed satellite operation is justified and, having found that the applicant is qualified in all other respects, we conclude that a grant of the application would serve the public interest, convenience, and necessity.[2]

8. Accordingly, IT IS ORDERED, That the application (BALCT-930217KK) for consent to assign the license of station KRZB-TV, Hot Springs, Arkansas, from P.P.D. & G., Inc. to Agape Church, Inc. IS HEREBY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[2] Concurrent with our action herein, the staff is granting the aforenoted KRZB-TV modification application (BPCT-930409KK).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Central Missouri State University against Cablevision	CSR-3891-M MO0550

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: November 10, 1993; Released: November 24, 1993

By the Chief, Mass Media Bureau:

1. On July 1, 1993, a petition on behalf of Central Missouri State University, licensee of Station KMOS-TV (Educ., Channel 6), Warrensburg, Missouri, was filed with the Commission claiming that Cablevision, operator of a cable television system serving Norborne, Missouri, had declined to carry the station, even though the Grade B contour of KMOS-TV encompasses the system's principal headend located at north latitude 39°19'30" and west longitude 93° 56'35", and it is therefore a "local" signal within the meaning of Section 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). KMOS-TV requests that the Commission not only order Cablevision to carry its signal, but also that it order the system to carry it on channel 6, the channel on which the station broadcasts over-the-air.

2. Although no formal opposition was filed, in a letter dated April 30, 1993, to KMOS-TV, Cablevision maintained that the station's signal strength at Cablevision's headend was not sufficient to entitle it to mandatory carriage on Cablevision's system serving Norborne.

3. Cablevision's letter dated April 30, 1993, to KMOS-TV concerning its signal strength does not follow generally acceptable engineering practices to determine what constitutes a good quality signal. The 1992 Cable Act failed to set a standard for noncommercial educational ("NCE") stations, however, it did adopt a standard for determining the availability of VHF and UHF commercial stations at a cable system's headend. To establish the availability of a VHF commercial station's signal, the 1992 Cable Act set out a standard of -49 dBm at a cable system's headend. A standard of -45 dBm was established for UHF commercial station signals. Since these standards address the issue of availability of a station's signal, consistent with Congress' guidance with respect to VHF and UHF commercial station availability, we see no reason not to utilize the same standards as *prima facie* tests to initially determine whether a NCE station provides a cable system with a good quality signal. Generally, if the test results for VHF stations are less than -55 dBm, we believe that at least four readings must be taken over a two hour period. Where the initial readings are between -55 dBm and -49 dBm, inclusive, we believe that the readings should be taken over a 24-hour period, with measurements no more than four hours apart to establish reliable test results.[1] In addition to the information required by our rules to be furnished to the affected station when there is a dispute over signal level measurements,[2] cable operators are expected to employ sound engineering measurement practices. Therefore, signal strength surveys[3] should, at a minimum, include the following: 1) specific make and model numbers of the equipment used, as well as its age and most recent date(s) of the calibration; 2) description (s) of the characteristics of the equipment used, such as antenna ranges and radiation patterns; 3) height of the antenna above ground level and whether the antenna was properly oriented; and 4) weather conditions and time of day when the tests were done. When measured against these criteria, we conclude that the information submitted by Cablevision is insufficient to demonstrate that KMOS-TV does not provide a good quality signal to the cable system's principal headend.

4. Since Cablevision filed no further pleadings in the above proceeding, the complaint filed July 1, 1993, by Central Missouri State University IS GRANTED in accordance with Section 615(j) (3) (47 U.S.C. Section 535) of the Communications Act of 1934, as amended, and Cablevision IS ORDERED, to commence carriage of Station KMOS-TV, Warrensburg, Missouri, on channel 6 on its cable television system serving Norborne, Missouri, forty-five (45) days from the release date of this *ORDER* unless Cablevision submits the engineering data required herein to support its assertion of poor signal quality at its principal headend. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by Section 0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] Generally, if the test results for UHF stations are less than -51 dBm we believe that a least four readings must be taken over a two hour period. Where the initial readings are between -51 dBm and -49 dBm, inclusive, we believe that the readings should be taken over a 24-hour period with measurements not more than four hours apart to establish reliable test results.

[2] *See* Section 76.61 of the Commission's Rules.

[3] Field strength measurements for the determination of Grade B contours shall follow the procedures set forth in Section 73.686 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Adell Broadcasting Corporation against Cablevision Industries	CSR-3860-M MI0515

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: November 10, 1993; Released: November 24, 1993

By the Chief, Mass Media Bureau:

1. On June 15, 1993, a petition on behalf of Adell Broadcasting Corporation, licensee of Television Broadcast Station WADL (Ind., Ch. 38), Mount Clemens, Michigan, was filed with the Commission claiming that Cablevision Industries ("CVI"), operator of a cable television system serving Dearborn, Michigan, had declined to carry the station, even though WADL is a "local" signal within the meaning of Section 4 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992), because WADL is a commercial broadcast station in the Detroit, Michigan ADI, where Dearborn, Michigan is located. An opposition to this complaint was filed July 22, 1993, on behalf of CVI, to which WADL responded on August 4, 1993. Subsequently, on August 23, 1993, CVI filed a further response to WADL's reply to its opposition.

2. In support of its petition, WADL states that it first requested carriage on CVI's Dearborn system by letter dated April 9, 1993, but was denied its request on April 30, 1993 because, according to CVI, over 50% of WADL's programming was devoted to home shopping programming. WADL's second carriage request on May 19, 1993, after forwarding a program schedule to substantiate that as of June 1, 1993 less than half of its programming would be devoted to home shopping, elicited another denial in which it was stated that CVI needed to monitor WADL "to ensure that it complies with the Must Carry rules in regard to program length commercials." WADL states that its third letter, objecting to this stance, was not responded to nor has CVI commenced carriage of its signal.

3. CVI's opposition acknowledges that initially WADL was predominantly a home shopping/program length commercial station but it apparently altered this status, effective June 1, 1993, when it reduced such programming to just under 50% of its overall schedule.[1] However, CVI maintains that, despite this change and the Commission's decision on home shopping channels, in its *Report and Order in MM Docket No. 93-8*, 8 FCC Rcd 5321 (1993), WADL is still not a must-carry station in Dearborn because the station, which is identified as a CBS "alternate affiliate", is the second CBS affiliate in the Detroit ADI in which Dearborn is located. Since Congress did not distinguish between primary, alternate and secondary network affiliations in choosing which of like network affilites to carry, CVI argues that the other CBS affilate, Station WJBK-TV (CBS, Ch. 2), Detroit, Michigan, which is located closer to the principal headend of CVI's Dearborn system, is the one required to be carried. Moreover, CVI claims that WADL does not broadcast any locally-originated programming, and that, in fact, it even retransmits the local news originated and broadcast by WJBK-TV.

4. In its reply, WADL maintains that it is fully eligible for carriage on CVI's Dearborn system and the system's reliance on its claim that WADL is the second CBS affiliate in its market as a reason to refuse carriage is misplaced. WADL argues that as an "alternate affiliate" it has no written agreement with the network nor does it receive any compensation. Indeed, WADL points to a letter it submits from CBS which states that ". . . There is no affiliation agreement between WADL-TV and CBS; . . . WADL-TV at its discretion can either accept or reject such programming as offered by CBS." WADL emphasizes, therefore, that its "Broadcast Agreement" is not an affiliate agreement as envisioned by the Commission and CVI's premise that it is a network affiliate is incorrect. In addition, WADL notes that despite CVI's claim that it cannot carry WADL in lieu of or in addition to the closer WJBK-TV, the system does carry Station WGPR-TV (Ind., Ch. 62), Detroit, Michigan, which is also an alternate affiliate of CBS. Finally, WADL states that CVI's claims of procedural errors are without merit. Section 76.7(c)(4)(iii)(A) of the Commission's Rules states that the deadline for filing a complaint is triggered by the cable operator's denial of carriage. Since CVI's first denial of carriage came by letter dated April 30, 1993, WADL feels that its June 15, 1993 complaint was timely filed. Moreover, WADL argues that CVI's contention that its must-carry obligations with regard to WADL were not triggered until 45 days after the station changed its programming is immaterial. That deadline has long passed, and WADL is still not being carried. If carriage commences, however, WADL states that it would gladly withdraw its complaint.

5. CVI states in its further response that it intends to comply fully with any and all must carry requirements, but reiterates that it still feels that WADL is not entitled to must carry status on its system. It indicates that it is especially concerned over WADL's vacillating statements as to its network affiliation, the unclear nature of the agreements and compensations that exist between WADL and CBS, and the apparent fact that nothing in this regard has been filed with the Commission. CVI therefore requests that the Commission order WADL to produce all documents which would clarify the station's relationship with the network. Finally, with regard to CVI's carriage of another CBS "alternate affiliate", the system merely states that while the Commission's rules allow cable operators to

[1] CVI states that WADL did not remedy the circumstances preventing it from demanding must-carry status until June 1, 1993 when it altered its program schedule. CVI maintains, however, that the *Clarification in MM Docket No. 92-295*, released June 10, 1993 allows 45 days for a cable system to comply with such an alteration. Therefore, its must carry obligations with respect to WADL, if any, did not exist as of the date the complaint was filed.

carry the signals of any duplicate affiliates its chooses, it also gives them the discretion to choose those it does not carry.

6. Since the issue of the number of hours of home shopping programming being carried by WADL has been resolved, the only issues remaining with regard to the carriage of WADL on CVI's Dearborn system appear to be those of network affiliation and program duplication. We do not agree, however, with CVI's assesment that WADL is a network station. Section 76.55(f) defines a network station as one that offers network programming on a regular basis for 15 or more hours per week. The affidavit of Franklin Adell, President of Adell Broadcasting Corportion, clearly states that the station has no written agreement with CBS, and this is confirmed by a letter from Robert D. Shellard, Director of Planning and Administration from CBS' office of Affiliate Relations. In addition, the four programs cited by CBS in its letter as being carried by WADL do not constitute 15 or more hours per week of regular network programming. We, therefore, consider WADL to be an independent station and not affiliated with a network. As such, CVI's reliance on Section 76.56(b)(5) of the Commission's Rules in its refusal to carry WADL is misplaced. Finally, CVI has not submitted any additional showings to meet its burden of proof concerning potential program duplication by WADL.[2]

7. Accordingly, the petition filed June 15, 1993, by Adell Broadcasting Corporation IS GRANTED, pursuant to Section 615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and Cablevision Industries IS ORDERED to commence carriage of Station WADL forty-six (46) days from the release date of this Order. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by Section 0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[2] On March 11, 1993, the Commission adopted *Report and Order in MM Docket No. 92-259*, 8 FCC Rcd 2965, 3012 (1993), which included a new §76.56(b)(5) of the Commission's Rules which explained that for commercial stations ". . . substantially duplicates means that a station regularly simultaneously broadcasts the identical programming as another station for more than 50 percent of the broadcast week. For purposes of this definition, only identical episodes of a television series are considered duplicative and commercial inserts are excluded from the comparison."

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Rural California Broadcasting Corporation against DR Partners d/b/a Donrey Cablevision	CSR-3879-M CA0388

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: November 9, 1993; Released: November 24, 1993

By the Chief, Mass Media Bureau:

1. On July 2, 1993, a petition on behalf of Rural California Broadcasting Corporation, licensee of Station KRCB-TV (Educ., Ch. 22), Cotati, California, was filed with the Commission claiming that DR Partners d/b/a Donrey Cablevision ("Donrey"), operator of a cable television system serving Vallejo, California, had declined to carry the station, even though Cotati is within fifty miles of the system's principal headend located near Vallejo at latitude 38°06'38", longitude 122°10'26", and is therefore a "local" signal within the meaning of Section 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). KRCB-TV requests that the Commission not only order Donrey to carry its signal, but also order the system to carry it on Channel 22, the channel on which it broadcasts over-the-air. An opposition to this petition was filed on August 5, 1993 on behalf of Donrey to which KRCB-TV responded on August 26, 1993.

2. Initially, by fax dated December 4, 1992, addressed to KRCB-TV, Donrey stated that it was already meeting its NCE carriage obligations and that it also believed KRCB-TV's programming substantially duplicates that of the following four NCE stations it already carries: KQED (Educ., Ch. 9), San Francisco, California; KCSM-TV (Educ., Ch. 60), San Mateo, California; KTEH (Educ., Ch. 54), San Jose, California; and KVIE (Educ., Ch. 6), Sacramento, California. Further, in an April 30, 1993 letter declining to carry KRCB-TV, Donrey contends that KRCB-TV fails to consistently deliver a -45 dBm quality signal to the system's headend. It states that it used a Tektronix Model 2710 Spectrum Analyzer with a UHF antenna peaked toward KRCB-TV prior to the measurement. In its opposition, Donrey indicates that it carried KRCB-TV from October 1990 to January 1992, but experienced so many instances of signal loss without receiving a satisfactory explanation or solution to the problem that it dropped the station. After the passage of the 1992 Cable Act, Donrey states that KRCB-TV demanded carriage, but made no response to the issue of signal quality until after Donrey sent information on the signal quality test made at the system's headend. It maintains that KRCB-TV's request for further information on the matter was followed immediately by the filing of its complaint with the Commission. Further, Donrey states that by letter dated July 30, 1993, KRCB-TV contended that the signal problems were the fault of Donrey, that the UHF parabolic antenna Donrey used in its test was peaked toward Television Broadcast Station KFTY (Ind., Ch. 50), Santa Rosa, California and not KRCB-TV, and that the "low signal levels reported by Donrey are related to the use of the directional parabolic antenna which cannot simultaneously receive both KFTY-TV and KRCB-TV at optimum levels." Donrey maintains, however, that despite the fact that its parabolic UHF antenna was directed toward KRCB-TV prior to its removal from the system and retained in that orientation since, the intermittent signal loss still continues. Finally, Donrey concludes that the filing of KRCB-TV's complaint was premature, particularly in the instant situation where the parties involved are attempting to work out a solution. In light of the above, Donrey requests that the Commission deny KRCB-TV's complaint.

3. In response to Donrey's earlier fax and letter, KRCB-TV disputes Donrey's claim of substantial duplication. In addition, KRCB-TV states that Donrey did in fact carry its signal from approximately October 1990 until February 1992, but that it was dropped suddenly and without prior notification even though the system has an active 62 channel capacity. KRCB-TV feels that its signal was dropped for marketing reasons and not, as claimed by Donrey, due to technical or engineering problems due to a poor quality signal. In its reply to the opposition, KRCB-TV argues that Donrey's pleading was not filed within the requisite 20 day period required by Section 76.7 of the Rules and should not be accepted. It goes on to state that it was its understanding, through previous contact with Donrey's engineers, that prior to April 30, 1993 the signal difficulties had been vastly improved. It was only after that date, claims KRCB-TV, that Donrey again raised this issue. However, the station reiterates its belief that the alleged low signal levels reported by Donrey are due to a fault in the sytem's directional parabolic antenna.

4. Initially, we note that on March 11, 1993, the Commission adopted a *Report and Order in MM Docket No. 92-259*, 8 FCC Rcd 2965, 3012 (1993), which included a new Section 76.56 of the Commission's Rules concerning cable systems' signal carriage obligations, including a note which explained that for NCE stations, ". . . a station will be deemed to 'substantially duplicate' the programming of another station if it broadcasts the same programming, simultaneous or nonsimultaneous, for more than 50 percent of prime time, as defined in Section 76.5(n), and more than 50 percent outside of prime time over a three month period." Donrey's December 4, 1992 fax, therefore, is insufficient to substantiate its allegation of substantial duplication.

5. Moreover, §615(g)(4) of the Communications Act of 1934, as amended, states that "a cable operator shall not be required to carry the signal of any qualified local noncommercial educational television station which does not deliver to the cable system's principal headend a signal of good quality or a baseband video signal, as may be defined by the Commission." 47 U.S.C. 535(G)(4). Because the cable operator is in the best position to know whether a given NCE station is providing a good quality signal to the system's principal headend, we believe that the initial burden of demonstrating the lack of a good quality signal appropriately falls on the cable operator. In meeting this burden, the cable operator must show that it has used good engineering practices, as defined below, to measure the signal delivered to the headend.

6. With respect to the standard to be used to determine what constitutes a "good quality" signal, we note that the 1992 Cable Act failed to set a standard for either VHF or UHF noncommercial stations. However, the 1992 Cable Act did adopt a standard for determining the availability of VHF and UHF commercial stations at a cable system's headend. To establish the availability of a VHF commercial station's signal, the 1992 Cable Act set out a standard of -49 dBm at a cable system's headend. A standard of -45 dBm was established for UHF commercial station signals. Consistent with Congress' guidance with respect to VHF and UHF commercial station availability, we see no reason not to utilize the same standards as *prima facie* tests to initially determine, absent other evidence, whether VHF or UHF non-commercial stations place adequate signal levels over a cable system's principal headend.

7. In this instance, Donrey determined KRCB-TV's signal strength to be below the requisite level for a UHF commercial station. We find, however, that the cable system failed to follow generally acceptable engineering practices in making its determination. Generally, if the test results are less than -51 dBm for a UHF station, we believe that at least four readings must be taken over a two hour period. Where the initial readings are between -51 dBm and -45 dBm, inclusive, we believe that the should be taken over a 24-hour period with measurements not more than four hours apart to establish reliable test results.[1]

8. In addition to the information required by our rules to be furnished to the affected station when there is a dispute over signal level measurements, cable operators are expected to employ sound engineering measurement practices. Therefore, signal strength surveys should, at a minimum, include the following: 1) specific make and model numbers of the equipment used, as well as its age and most recent date(s) of calibration; 2) description(s) of the characteristics of the equipment used, such as antenna ranges and radiation patterns; 3) height of the antenna above ground level and whether the antenna was properly oriented; and 4) weather conditions and time of day when tests were done. When measured against these criteria, we conclude that the test submitted by Donrey is insufficient to demonstrate that KRCB-TV's signal is not of "good quality" at the cable system's headend.

9. Finally, Donrey's contention that, as a system with more than 36 channels, it has met its NCE carriage obligations pursuant to Section 615 of the 1992 Cable Act because it is already carrying four NCE stations, is in error. Section 76.56(a)(iii) of the Rules requires that all cable systems with more than 36 channels must carry a *minimum* of three NCE channels, but it does not preclude requiring such a system to carry additional NCE channels. Indeed, paragraph 11 of the *Report and Order in MM Docket No. 92-259, supra*, specifically states: "[s]ystems with a capacity of more than 36 usable activated channels are *generally required* to carry the signal of *all* qualified local NCE stations requesting carriage" (emphasis supplied). The only exception to this requirement is when there is proven substantial programming duplication between local NCE stations.

10. KRCB-TV's petition establishes that it is entitled to carriage on the Vallejo cable system, and it has requested carriage on its over-the-air broadcast channel, as it is permitted to do under Section 5 of the 1992 Cable Act. Accordingly, the petition filed July 2, 1993, by Rural California Broadcasting Corporation IS GRANTED, pursuant to Section 615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and Donrey Cablevision IS ORDERED to commence carriage of KRCB-TV on Channel 22 forty-six (46) days from the release date of this *Order* unless Donrey submits the engineering data required herein to support its assertion of poor signal quality from KRCB-TV at Donrey's principal headend. This action is taken if by the Chief, Mass Media Bureau, pursuant to authority delegated by Section 0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] For VHF-TV stations, if the test results are less than -55 dBm for a VHF station, we believe that at least four readings must be taken over a two hour period. Where the initial readings are between -55 dBm and -49 dBm, inclusive, we believe that the readings should be taken over a 24 hour period, with measurements no more than 4 hours apart to establish reliable test results.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Greater Dayton	CSR-3935-M
Public Television against	IN0402
TCI Cablevision of Indiana, Inc.	

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: November 9, 1993; Released: November 24, 1993

By the Chief, Mass Media Bureau:

1. On July 19, 1993, a petition on behalf of Greater Dayton Public Television, licensee of Television Broadcast Station WPTO (Educ., Ch. 14), Oxford, Ohio, was filed with the Commission claiming that TCI Cablevision of Indiana, Inc. ("TCI"), operator of a cable television system serving Lynn, Indiana, had declined to carry the station, even though Oxford, the city of license of WPTO, is within fifty miles of the principal headend of TCI's system located at north latitude $40^{0}02'42"$ and west longitude $84^{0}56'11"$ and WPTO, therefore, is a "local" signal within the meaning of §5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). WPTO requests that the Commission not only order TCI to carry its signal, but also order that the system carry it on channel 14, the channel on which it broadcasts over-the-air. No opposition to this petition has been filed.[1]

2. WPTO's petition establishes that it is entitled to carriage on the Lynn cable system, and it has requested carriage on its over-the-air broadcast channel, as it is permitted to do under Section 5 of the 1992 Cable Act. Since no other pleadings have been filed in this matter, the complaint filed July 19, 1993, by Greater Dayton Public Television IS GRANTED, in accordance with Section 615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and TCI Cablevision of Indiana, Inc. IS ORDERED to commence carriage of WPTO on cable channel 14 forty-six (46) days from the release date of this *Order*. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by Section 0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] In a notification to WPTO, TCI indicates possible copyright and signal quality concerns, but gives no specifics. WPTO states, however, that it provided TCI with a written copyright indemnity agreement and advised the system that it agreed to provide the requisite "good quality signal".

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-298

In re Applications of

LUCINDA FELICIA PAULOS	File No. BPH-880518MB
JOHN A. CAROLLO, JR.	File No. BPH-880519MX
MANZANITA MEDIA, INC.	File No. BPH-880519NR

For Construction Permit for
New FM Station, Channel 229A,
Sebastopol, California

Appearances

Peter A. Casciato, Esq. on behalf of Lucinda Felicia Paulos; *Stephen Diaz Gavin, Esq.* on behalf of John A. Carollo, Jr.; *John D. Pellegrin, Esq.* on behalf of Manzanita Media, Inc.

DECISION

Adopted: November 16, 1993; Released: November 26, 1993

By the Review Board: MARINO (Chairman), and GREENE. Board Member BLUMENTHAL concurring and issuing Statement.

Board Chairman MARINO:

1. Three applicants remain in this comparative case for a new FM broadcast station at Sebastopol, California. Each has filed exceptions to the *Initial Decision* (I.D.), 7 FCC Rcd 3145 (1992), issued by Administrative Law Judge Richard L. Sippel (ALJ), holding that John A. Carollo, Jr. (Carollo) is the superior comparative applicant. *See* I.D. at ¶ 120-122. The decisional issues in this case revolve generally around the finding that Carollo is the superior comparative applicant when judged by the Commission's comparative policy and precedent growing out of its *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). We affirm the ALJ's selection for the reasons set out below.

Comparative Evaluation

2. Under the *Policy Statement*, which, during the pendency of the Commission's *Reexamination of the Policy Statement on Comparative Broadcast Hearings*, 7 FCC Rcd 2664 (1992), continues to govern the analysis of comparative proceedings for new broadcast facilities, *but see Bechtel v. FCC*, 957 F.2d 873 (D.C. Cir. 1992), and *Flagstaff Broadcasting Foundation v. FCC*, 979 F.2d 1556 (D.C. Cir. 1992), applicants integrating their owners into station management may receive significant preferences if their proposals satisfy the fundamental licensing criteria of local familiarity, which includes past residence in the community of license and involvement in civic activities, and minority ownership, 1 FCC 2d at 395-96; *see generally Radio Jonesboro, Inc.*, 100 FCC 2d 941 (1985); *Waters Broadcasting Corp.*, 91 FCC 2d 1261 (1982), *aff'd sub nom. West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985). Past broadcast experience merits minor comparative credit. 1 FCC 2d at 396. Additional credit of varying comparative weight is available for, *inter alia*, efficient use of the frequency and auxiliary power. *Id.* at 397-99; *Addendum to Policy Statement on Comparative Broadcast Hearings*, 2 FCC 2d 667 (1967); *Linda U. Kulisky*, 8 FCC Rcd 6235 at ¶ 2 (Rev. Bd. 1993).

3. Applying these standards, the ALJ found that Carollo, a sole proprietor, was the comparative winner because his 100% quantitative integration credit for proposing to participate full time in the operation of the station was enhanced by "a substantial qualitative credit for his long-term 30 years residency in the service area and near the city of license and a moderate credit for his related civic activities." I.D., ¶ 120. He further held that Lucinda Felicia Paulos (Paulos), with an equal 100% quantitative credit for integration, finished second because of her "moderate credit for local residence and related civic involvement and slight credit for her broadcast experience." I.D., ¶ 121. Manzanita Media, Inc. (MMI) finished last because, the ALJ held, it had not justified effectuation of 80% of the integration credit it sought. *See* ¶ ¶ 13-15 *infra*.

John A. Carollo, Jr.

4. Paulos and MMI initially contend that Carollo's integration credit should be reduced to 50% because the proposed station has been, and will be, financed with community property. Additionally, they state, Carollo's wife proposes to work at the station and coordinate with her husband "volunteer local school produced programming." Both competitors assert that community property may be "transmuted" into separate property only by express written consent, or "declination" by the affected spouse. In essence, MMI urges that community property interests are cognizable in comparative cases "unless there is a declination". It cites two Initial Decisions, and *Virginia Communications, Inc.*, 2 FCC Rcd 1895, 1898 (1987). *See* MMI's *Exceptions* at pp. 5-6, and note 1; and Paulos' *Exceptions*, pp. 21-22.

5. We will affirm the ALJ's findings and conclusions on the community property issue. *See* I.D, ¶ ¶ 56-59 and 113-114. As the ALJ correctly held: "The community property concept is exclusively a matter of state law in Commission comparative cases. *Richard P. Bott, II*, 4 FCC Rcd 2508 (1990). *Without specific proof of shared spousal control, none will be assumed.*" I.D., ¶ 113. (Emphasis added.) Carollo used joint funds to pay for prosecution expenses, but, the ALJ correctly observed that "the use of joint funds will not be the sole basis for rejecting an integration claim. *Jerome Thomas Lamprecht*, 99 FCC 2d 1219, 1224 (Rev. Bd. 1984)...." Here, the record does not contain even a hint that the "wife would have an ownership interest or that she would participate in control," I.D., ¶ 113, and any allegations to the contrary are simply conjecture and speculation. Neither provides a legal basis for overturning the ALJ's conclusion. MMI's reliance on two initial decisions neither reviewed nor decisional on appeal is misplaced as the I.D.s

cannot undermine the Commission's standard set out in *Bott. See, e.g., WFPG, Inc.*, 24 RR 419, 425-426 (1962). And *Virginia Communications, Inc., supra*, also relied upon by MMI, concerned allegations about the lottery winner's qualifications, *Algreg Cellular Engineering*, 6 FCC Rcd 5299, 5300 (Rev. Bd. 1991), and whether a husband had engaged in "stuffing of the ballot box" for the lottery by encouraging applications by his wife, family members and friends. Here, as the ALJ correctly found, Carollo had no motive to conceal his wife's involvement because at the time of the hearing in this case the Commission awarded gender preferences. I.D., ¶ 114.

6. Since 1959, Dr. John A. Carollo, Jr. has practiced family medicine in Sebastopol, working seven days a week, and has now decided that it is time for him to leave the practice of medicine. I.D., ¶ 57. Carollo proposes to spend full time constructing and operating the station as its general manager, making all programming and personnel decisions, and supervising all administrative and operational decisions. He will employ his current secretary, who will be responsible for billing, collecting, and distribution of funds. I.D., ¶ 58. After noting that Carollo planned to retire from his medical practice in the near future, the ALJ held that "there would be no job conflict with his running the station on a full-time basis." I.D., ¶ 115.

7. Paulos argues in her *Exceptions*, at pp. 22-23, that an amendment filed after the hearing which indicates that Carollo has taken a position as medical director of a local hospital, "a job requiring approximately eight hours per week", casts doubt upon "his commitment to retire from his medical practice at the end of 1991." Paulos also asserts that because Carollo failed to specify the number of hours required for his civic activities his fulltime integration proposal must be discredited. *Id.*

8. On October 16, 1991, Carollo filed a petition for leave to amend reporting that on September 1, 1991 he was hired for the position of Medical Director of a local hospital. His new "part-time" position will require "approximately eight (8) hours per week" and represented a "year to year commitment". Carollo affirmed in his proposed amendment that:

> Even if the grant of my application becomes final while I still hold this position, I can still accommodate the Medical Directorship with my integration commitment.

Carollo reaffirmed his commitment "to terminate my medical practice in the event that the Commission grants my application for the new FM station at Sebastopol. As I testified during the hearing (Carollo, Tr. 951), I plan to retire from my medical practice by the end of the year."

9. In his *Memorandum Opinion and Order*, FCC 91M-3196, released November 4, 1991, the ALJ noted that there had been "no request to recall Dr. Carollo for cross-examination on this evidence of a new employment position." The ALJ also indicated that: "A medical practice is different from a medical directorship and it cannot be found that Carollo's plan to retire from his medical practice would extend to his medical directorship". However, the ALJ held that Carollo was legally justified in his amendment in relying "on a 55 hours standard approved by the Review Board in *Newton Television, Ltd.*, 3 FCC Rcd 553, 554 (Rev. Bd. 1988) (15 hours outside employment plus 40 hours at station accepted as reasonable)". In sum, we affirm the ALJ's reasoning that even if Carollo would not leave his position as medical director after one year "Carollo's 48 hours of employment with the station (40) and medical center (8) is well within the Newton Television standard." Moreover, with regard to the time Carollo spends on civic activities the Board has held that participation in civic activities "comes with the territory" of a proposed general manager like Carollo. *Newton Broadcasting*, 3 FCC Rcd 554 at ¶ 5. An applicant's "civic involvement could be so vigorous that such interest" would conflict with the integration commitment, *see Helen Broadcasters, Inc.*, 7 FCC Rcd 2501, 2502 ¶ 10 and n.3 (Rev. Bd. 1992); however, without such a record, the Board will not treat civic activities as if they are outside business interests. Here, the ALJ, who was fully informed about Carollo's civic commitments, *see* I.D. ¶ ¶ 62-68, concluded that they were not "so extensive as to impede" his integration pledge or responsibilities to the proposed station. *See Memorandum Opinion and Order, supra*, FCC 91M-3196 at ¶ 5.

10. Finally, MMI argues that Carollo made statements in his deposition which indicated that he intended to allow someone else, a then competing applicant, Beth Knight, to manage the proposed station. MMI argues that the ALJ erred at the hearing when he foreclosed Knight's attempt to cross-examine Carollo about those statements and that the ALJ erred because "the brief *possible* mention of settlement -- denied by the other party" to the conversation does not immunize the entire discussion from inquiry. MMI Exceptions, pp. 7-8.

11. At the outset, we note that the Deposition Testimony, pp. 22-25, which MMI attaches to its Exceptions, is far from clear about Carollo's plans for the management of his proposed station vis-a-vis his then-competitor Knight.[1] In

[1] The Transcript of Carollo's Deposition, at p. 24, lines 2 to 25, contains the following exchange between Knight's counsel and Carollo:

> Q. What do you recall telling her?
>
> A. I told her I was going to be running it personally.
>
> Q. You did not tell her that you did not intend to run the station, that your primary interest was in -- was broader than actual management on a daily basis, and you wanted a well-run station, but you were not, yourself, necessarily committed to run it personally? You -- you're saying that you did not tell her that?
>
> A. Well, I don't remember the exact conversation. She may have quoted it. My intent has always been to be primarily involved in the programming. Because I don't think there's anybody else in the community that can do that.
>
> Q. Do you recall asking Miss Knight, if she were not successful and you were, whether she would be interested in managing the station for you?
>
> A. She and I have some similar ideas.

any event, we agree with Carollo that further inquiry would not have been probative since the alleged statements were made in June of 1990, more than a month before all applicants had to finalize their integration proposals on July 30, 1990. *See Prehearing Conference Order,* FCC 90M-2093, released July 11, 1990; and Tr. 1003-1004. Moreover, the competing applicant who sought to cross-examine Carollo about those statements admitted that she approached him about possible settlement both before and after his deposition. Tr. 995. Thus, the ALJ correctly invoked the rule that statements made in the context of settlement discussions will not be admitted because they violate the public policy which favors confidentiality of discussions to encourage negotiations and settlements. *Horne Industries, Inc.,* 91 FCC 2d 1193, 1995 (Rev. Bd. 1982). *See* Tr. 1000-1001. We affirm the ALJ's ruling because the evidence was not "probative" and was also "inadmissible." Carollo is entitled to the 100% integration credit he was awarded by the ALJ.

Manzanita Media, Inc.

12. In its Exceptions, at pp. 9, 12-14, MMI argues that it should have received comparative credit for the full-time proposed integration of Carol A. (Kushnir) Crew, a 60% stockholder, and Kenneth Kushnir, a 20% stockholder. There is no challenge to the proposed integration of the other 20% stockholder. *See* I.D. ¶ ¶ 71-72. However, the ALJ found (I.D. ¶ 72) that Ms. Crew would continue to own a substantial 49% interest in Empire Communications, Inc. of Santa Rosa:

> Empire is an FCC licensee engaged in non-broadcast communications lines of business which include the sales and servicing of two-way radio systems, office telephone systems, pocket pagers and car telephones (MMI Exh. 6 at 8.) Crew is committed to curtailing or leaving Empire if those duties conflict with her duties at Sebastopol. In that regard, Crew believes that her duties at the Sebastopol station would require 70% of her time. (MMI Exh. 6 at 60.) Therefore, she may merely take a leave of absence from Empire and return at some later date. (MMI Exh. 6 at 61-62.) There is no evidence indicating that Crew will sell her equity ownership in Empire. Nor is there a specific plan on how Crew's duties at Empire would be carried out in her absence.

Similarly, Kenneth Kushnir (Ms. Crew's former spouse) would continue to retain a controlling 51% interest in Empire, and the ALJ also found (I.D. at ¶ 76) that:

> Kushnir committed to "curtail or leave" his employment with Empire in order to effectuate the MMI proposal. He has owned Empire for twenty-two years and he has no intention to sell Empire even if MMI's application is granted. (Kushnir, Tr. 1031.) Crew, his former spouse, testified that Empire was Kushnir's full-time employment. (MMI Exh. 6 at 63.) There is no evidence offered by MMI of the size of Empire's operations (*e.g.,* number of employees, gross sales, value of inventory). Nor did MMI offer evidence of a specific plan for Kushnir to "curtail" his full-time commitment to Empire, including management staffing that could and would replace or fill in for himself and Crew while they were attending to broadcast business at the Sebastopol station.

13. Based upon these findings, the ALJ held that: "Kushnir and Crew have failed to offer evidence of a plan for the operation of Empire in their respective absence". He noted that "in situations where the applicant proposed full-time integration into a new broadcast station" and has other "substantial ongoing business interests" the Board has held that it is insufficient to offer "generalized promises to diminish the time spent managing the other business interest." *See* I.D. ¶ 118. Among other authorities the ALJ relied upon was our decision in *Naguabo Broadcasting Company,* 6 FCC Rcd 914 (Rev. Bd. 1991). We recently observed in *Linda Kulinsky,* 8 FCC Rcd at 6238-39 ¶ 15, that applicants like Crew and Kushnir, seeking full time integration credit must set forth their integration proposals "in some detail", and that the Commission on appeal in *Naguabo, supra,* had agreed that such applicants must: "set forth a specific and credible plan for accommodating [their] outside interests with [their] plan for full-time integration... Such a showing is necessary because the very existence' of outside interests renders an applicant's commitment questionable. *Blancett Broadcasting Co.,* 17 FCC 2d 227, 230 (Rev. Bd. 1969)." *See Naguabo Broadcasting Co.,* 6 FCC Rcd 4879, 4880 (1991), *modified on other grounds,* 7 FCC Rcd 1669 (1992); followed in *Kevin Potter,* 7 FCC Rcd 3292 (1992).

14. Here, MMI's principals did not quantify the amount of time that they have in the past, and propose in the future, to devote their Empire business venture. And their promise to "curtail or leave" that conflicting business interest in the future, if it interferes with their fulltime broadcast integration commitment, is too contingent, evanescent, and legally insufficient to meet their specific burden of proof. Thus, we affirm the ALJ's conclusion which is supported by the past authority he relied on, as well as more recent authority. *See e.g., Gloria Bell Byrd,* 8 FCC Rcd 7124 (1993) (principal's retention of business and lack of unequivocal resignation pledge therefrom necessitated denial of integration credit); *Richard M. Carrus,* FCC 93R-59, adopted November 3, 1993. Disallowance of either Kushnir's 20% interest or Crew's 60% interest - or both - results in a substantial reduction of MMI's integration credit and removes it from further comparison with Carollo and Paulos who were each awarded 100% integration credit. *See Miracle Strip Communications, Inc.,* 4 FCC Rcd 5064 (1989) (recognizing clear quantitative advantage).

> Q. Do you recall asking her whether if she were successful -- if you were successful and she were not, whether she would be interested in managing the station for you?
>
> A. In working for me.
>
> Q. You didn't say managing the station for you?
>
> A. I don't remember that. But I would have no objections to that.

Lucinda Felicia Paulos

15. As previously noted, the ALJ made a contingent comparative finding that Paulos, if basically qualified, "would finish second behind Carollo." I.D. ¶ 122. Paulos argues in her *Exceptions*, at p. 23, that this finding is "factually and legally wrong" because: "Paulos is the only applicant entitled to 100% full-time integration credit. Carollo is entitled to no more than 50% full-time credit due to his wife's joint interest and involvement in his application."

16. We have previously denied the exceptions of Paulos and MMI which claimed that Carollo's credit should be reduced to 50%, paras. 5-10 *supra*. Paulos has not excepted to the ALJ's finding that Carollo was entitled to "a substantial qualitative credit for his long-term 30 years residency in the service area and near the city of license and a moderate credit for his related civic activities." I.D., ¶ 120. Nor has she disputed the ALJ's decisional finding that: "Carollo is entitled to a significant enhancement credit under the unified residence-civic activities factor. *Great Lakes Broadcasting, Inc.*, 7 FCC Rcd 1929, 1931 (Rev. Bd. 1992)". *See* I.D. ¶ 120.

17. Paulos does argue that the ALJ erred in not awarding any "credit for her commitment to return to her long-time local residence in the proposed service area if she receives a grant in this case." (*Exceptions*, p. 19.) However, the Commission in *Great Lakes Broadcasting, Inc.*, 8 FCC Rcd 4007, 4009 (1993), held that a promise by an applicant in Paulos' position, to move back into the service area "is worth only slight credit" and does little to change the applicants' relative positions, especially in light of the fact that the competitor, Carollo, will continue to reside in the service area, where he has resided continuously since 1959. *See also Gloria Bell Byrd, supra.*

18. Finally, Paulos has excepted, *id.* at pp. 19-21, to the ALJ's evidentiary ruling rejecting certain cryptic evidence of civic involvements profferred in her hearing exhibit (Paulos Exh. 1 at 3-7), which the ALJ refused to admit, *inter alia*, because the cryptic references were followed by "a document letter or a newspaper article which may or may not be reliable." Tr. 432-434, I.D., ¶ 20. Paulos has not shown how the additional evidence of civic activities, if admitted, could have closed the significant gap which the ALJ found to exist between Carollo's more than 30 years of continuous residence in the service area, and near the city of license, and related civic activities, and Paulos' some eleven years of service area residence and related civic activities, which ended in 1991 when she moved to Hawaii. We, therefore, affirm the ALJ's selection of Carollo as the superior comparative applicant. Our action makes it unnecessary to reach the additional finding that Paulos is not financially qualified, and related issues. *See, e.g., Carollo Contingent Exceptions*, pp. 2-19, and I.D. ¶ ¶ 92-109.

19. ACCORDINGLY, IT IS ORDERED, That the application of John A. Carollo, Jr. (File No. BPH-880519MX) for a construction permit for a new FM station on Channel 229A in Sebastopol, California IS GRANTED; and that the applications of Lucinda Felicia Paulos (File No. BPH-880518MB) and Manzanita Media, Inc. (File No. BPH-880519NR) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

CONCURRING STATEMENT OF BOARD MEMBER NORMAN B. BLUMENTHAL

The majority's ultimate decision in this case, once again, turns on the award of ownership/management integration credit.[1] The winner this time is one Dr. John A. Carollo, Jr. A physician, Dr. Carollo has pledged to promote health reform, in his own fashion I suppose, by swearing to abandon completely his practice of medicine if awarded this radio station permit, though he nontheless "has taken a position as medical director of a local hospital." *Ante*, ¶ 8. But, says Dr. Carollo, his "medical directorship" of the hospital would not interfere with his broadcast integration. *Id.*, ¶ 9.

For reasons more fully set out in a series of prior cases,[2] my concurrence here is similarly reluctant, because the facts in this and comparable cases suggest that many of the full-time integration pledges we honor are as dubious as, say, a Bosnian cease-fire. Again, the 1965 *Policy Statement* under which we continue to operate calls for integration pledges such as Dr. Carollo's to be "*full-time*" and "*permanent*", *see* 1 FCC Rcd 393, 395 & n.6. But, as the *Bechtel* court observed, Dr. Carollo need not regard these "terms of art" in any objective sense. *See generally also Reexamination of Comparative Policy Statement*, 8 FCC Rcd 5475 (1993). I swallow this decision, therefore, with a heaping ladle of castor oil, and all the enthusiasm associated therewith.

[1] The courts have questioned directly the efficacy of the Commission's continued application of its long-standing "integration" criterion, *see Bechtel v. FCC*, 957 F.2d 873 (D.C. Cir. 1992); *Flagstaff Broadcasting Foundation v. FCC*, 979 F.2d 1566, (D.C. Cir. 1992), but the Commission has tentatively reaffirmed its adherence to that critical comparative criterion. *Anchor Broadcasting Limited Partnership*, 8 FCC Rcd 1674 (1993), *appeal pending sub nom. Bechtel v. FCC*, No. 92-1378, argued October 14, 1993.

[2] *See, e.g., Kevin Potter*, 6 FCC Rcd 7278, 7281 (Rev. Bd. 1991) (statement concurring *dubitante*). Although the Commission affirmed the *Potter* majority's award of integration credit to Mr. Potter, *see* 7 FCC Rcd 4342 (1992), an unpublished staff order *immediately* released Mr. Potter of the *very* integration pledge upon which Mr. Potter had prevailed. *See Order*, FCC 921-065, released July 20, 1992 (unpublished). Little wonder, then, why I find pledges like Dr. Carollo's to be an unsound basis for a construction permit award. *See also Linda Kulinsky*, 8 FCC Rcd 6235, 6239-6241 (Rev. Bd. 1993) (separate statement and cases cited therein).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 26, 1993

THE NATIONAL EXCHANGE CARRIER ASSOCIATION FILES REVISIONS TO ITS COST ALLOCATION MANUAL

PUBLIC COMMENT INVITED

On October 29, 1993, the National Exchange Carrier Association (NECA) filed proposed revisions to its Cost Allocation Manual for the separation of Category I and Category II costs. These proposed revisions reflect the addition of Telecommunications Relay Services. The revisions also reflect a company-wide reorganization. Parties may file comments on NECA's proposed revision no later than **December 13, 1993**. Replies should be filed by **December 28, 1993**. Comments should reference AAD 93-145.

A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20054 and the International Transcription Service (ITS), 2100 M St., N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L Street, N.W., Room 812, Washington, D.C. Copies are also available from ITS.

For further information contact Alicia Dunnigan at (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
November 18, 1993

Released: November 26, 1993

Michael P. Costello
3024 N. Shore Road
Bellingham WA 98226

Re: NAL/Acct. No. 215FE0126

Dear Mr. Costello:

This responds to your letter of September 16, 1992, requesting higher level review of a Notice of Forfeiture issued to you on August 19, 1992, for using voice communications on marine channel 70, 156.525 MHz. You requested reconsideration of the amount of the forfeiture based on the fact that you were unaware that voice communications were no longer permitted on marine channel 70, 156.525 MHz. You assert that the violation was not willful.

Over seven years ago marine channel 70, 156.525 MHz, was withdrawn from the group of channels allowed for voice communications and reserved for safety and distress calling by means of Digital Selective Calling (DSC). DSC is a technique for ship-to-shore and ship-to-ship calling by means of very brief sequences of digital codes. Receivers in the system are designed to respond only to one or more particular digital codes. This results in a system of calling similar to a land telephone whereby only a particular one or limited group of receivers are activated by a particular digital code. For the system to be effective, the particular frequency used for digital selective calling must be kept free of interference. The system will not function properly on a channel that is simultaneously being used for voice communications. Since the DSC system is intended to permit rapid alerting of other vessels and shore stations in event of an emergency, keeping the frequency clear of all interference is vital to the safety of vessels in the area. When the frequency is used for voice communications, the digital calling system cannot be used effectively. Thus, using the channel reserved for distress and safety calling using DSC for voice communications jeopardizes the safety of all vessels in the area.

We note that the transmissions you made on the prohibited channel were properly identified, and you made no effort to conceal the identity of your station. That tends to support your contention that you were unaware that voice communications were not permitted on that channel. We accept your assertion that you did not intend to commit a violation. The transmission itself, however, is the willful act which is the basis for a forfeiture. The Commission has reconsidered the usual forfeiture for this kind of violation. *See 1993 Policy Statement, Standards for Assessing Forfeitures,* 8 FCC Rcd 6215 (1993). In light of these standards and based on the fact that we have no record of prior violations on your part, we have decided to cancel the forfeiture. Therefore, Forfeiture No. 215FE0126 is cancelled. Because of the potential for interfering with distress and safety communications, any future violations of this kind will not be treated lightly.

Sincerely

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
November 18, 1993

Released: November 26, 1993

Mr. Mark S. Gladu
19524 Echo Lk Pl N
Seattle, Washington 98133

Re: NAL/Acct. 315AN0007

Dear Mr. Gladu:

This responds to your letter dated December 27, 1992, transmitting a copy of your 1991 income tax return and requesting cancellation of the Commission's Forfeiture Order released November 18, 1992, issued to you for willful and repeated violation of Section 301 of the Communications Act of 1934, as amended, 47 U.S.C. § 301. You based your cancellation request on your alleged inability to pay as documented by your income tax return.

Although not specifically identified as such, we have considered your letter to be a request for higher level review of an action taken under delegated authority. We have completed a review of the case and find that the serious nature of the violations does not justify cancellation of the forfeiture. Instructions accompanying the Notice of Apparent Liability stated that claims of inability to pay a forfeiture should be documented by submission of income tax returns covering the most recent three years. You submitted an income tax return for only one year. We are not persuaded of your claimed inability to pay. The Commission, however, has reconsidered the usual forfeiture for this type of violation. *See 1993 Policy Statement, Standards for Assessing Forfeitures* 8 FCC Rcd 6215 (1993). We are reducing the forfeiture amount to $500. No further reduction or mitigation appears warranted.

Accordingly, you are ordered to pay $500. Please submit a check or money order for this amount made payable to the Federal Communications Commission. Place the account number NAL/Acct. 315AN0007 on your remittance and send it to:

Federal Communications Commission
P.O. Box 73482
Chicago, IL 60673-7482

If you are unable to pay the full amount immediately, you may submit a request to make partial installment payments. Address such a request to:

Federal Communications Commission
Field Operations Bureau, Enforcement Division
Attention: Chief, Legal Branch, Stop Code 1500E3
1919 M St. N.W.
Washington, D.C. 20554

We are returning the income tax documents you submitted. They are enclosed.

Sincerely,

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
November 18, 1993

Released: November 26, 1993

Mr. Jack B. Morris
2885 Creasey Road
Custer, WA 98240

In reply, refer to:
215FE0102

Dear Mr. Morris:

This is in response to your August 9, 1992, letter requesting reconsideration of a notice of forfeiture bearing the account number 215FE0102 and issued to you for the willful operation of an unlicensed radio station aboard your vessel EASY.

A ship radio station license is not transferrable. When a boat is sold, the previous owner should remove the radio license and send it to the Commission for cancellation. The new owner must apply for a new license for the radio. Those requirements are set forth in Section 1.924(a)(1) and (2) of the Commission's Rules, 47 C.F.R.§ 1.924(a)(1) and (2).

Section 80.405(c) of the Commission's Rules, 47 C.F.R. § 80.405(c), in part, states, "The current station authorization or a clearly legible copy must be posted at the principal control point of each station." All ship station licenses are plainly marked with the expiration date. Therefore, if the station license had been properly posted as required by the rules, it should have been apparent to the operator that the license had expired.

The violation was considered to be willful not because you specifically intended to engage in unlicensed operation, but because the act of transmitting was itself a deliberately willful act. The transmissions were made because you wished to communicate, not because of a defective on-off switch or some other technical defect such as a stuck microphone button.

We note that you took prompt action to obtain a license for the radio aboard your boat after it came to your attention that it was unlicensed. However, such action cannot be used to justify mitigation or cancellation of penalties for past unlicensed operation. We also note that you were previously issued a monetary forfeiture for violation of Section 301 of the Communications Act in 1988.

The Commission has recently reviewed and revised its standards for assessing forfeitures of this type. *See* the *1993 Policy Statement, Standards for Assessing Forfeitures,* 8 FCC Rcd 6215 (1993). Based on that, but also considering that you previously committed the same type of violation, we are adjusting the amount of this forfeiture downward to $600.

You are ordered, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, to pay a forfeiture of $600. This amount is due immediately and should be paid within thirty (30) days of the date of receipt of this order.[1] It should be paid by check or similar instrument made payable to the Federal Communications Commission and sent to:

Federal Communications Commission
P.O. Box 73482
Chicago, IL 60673-7482

To assure proper credit, please place the number NAL/Acct. No. 215FE0102 on your remittance.

Any other communications concerning this matter should be sent to:

Chief, Legal Branch, Enforcement Division
Federal Communications Commission
Stop Code 1500E3, Attn: NAL/Acct. No. 215FE0102
1919 M Street, NW
Washington DC 20554

Sincerely,

Richard M. Smith
Chief, Field Operations Bureau

[1] You may contact the Commission's Dept Collection Officer in the Billings and Collections Branch, Stop Code 1110A2, 1919 M Street, N.W., Washington, DC 20554, if you are unable to pay the full amount of the forfeiture within the period designated above.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
November 18, 1993

Released: November 26, 1993

Nikkelbord, Broz, Wells & FryerRe: NAL/Acct. 215AN0002
Attention: Douglas M. Fryer
1001 Fourth Avenue Plaza, Suite 3300
Seattle, Washington 98154

Dear Sirs:

This is in further response to your October 29, 1992, letter requesting reconsideration of the forfeiture issued to the vessel AMERICAN PATRIOT, WUU5220, for operating on an unauthorized frequency in violation of Section 301 of the Communications Act of 1934, as amended, 47 U.S.C. § 301. You requested that the forfeiture be cancelled and a warning letter substituted for it because your client was not aware that such frequency usage was not permissible and made immediate correction upon notification of the violation by removal of the unauthorized channels from the ship's radio equipment.

Although not specifically identified as such, we considered your letter to be a request for higher level review. We have completed that review and note that the operators of the radio station aboard the vessel made an apparently deliberate attempt, when operating on the unauthorized frequency, to obscure their identity by not transmitting any station identification. Furthermore, ship station transmitters will not transmit in the mode and on the frequencies observed unless technically modified to provide such capability. Such intentional technical modification and usage are considered to be willful acts. Claims of unfamiliarity with the regulations cannot be the basis for mitigation of a penalty for such violations.

We do note, however, that Crown Fisheries, Ltd. does not have any prior record of forfeitures for similar violations. Therefore, based on that and the nature of the violation, we are reducing the amount of the forfeiture to $4,000. Neither you nor Crown Fisheries, Ltd. have provided any other information that would merit a further downward adjustment of the forfeiture amount.

Accordingly, your client is ordered to pay a forfeiture of $4,000. This amount is now due and payable immediately. Please submit a check or money order for this amount made payable to the Federal Communications Commission. Place the account number 215AN0002 on the remittance and send it to:

Federal Communications Commission
P.O. Box 73482
Chicago, Illinois 60673-7482

If your client is unable to pay the full amount immediately, you may submit a request to make partial installment payments. Address such a request to:

Federal Communications Commission
Field Operations Bureau
Attention: Chief, Legal Branch
Stop Code 1500E3
1919 M Street, N.W.
Washington, D.C. 20554

Sincerely,

Richard M. Smith
Chief, Field Operations Bureau

cc:
Crown Fisheries, Ltd.
9221 View Avenue, N.W.
Seattle, Washington 98117

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
November 18, 1993

Released: November 26, 1993

Paul Enquist
20417 80th Avenue West
Edmonds, WA 98026

In reply, refer to:
215FE0192

Dear Mr. Enquist:

This is in response to your November 27, 1992, letter requesting higher level review of forfeiture No. 215FE0192 that was issued for operation of an un- licensed radio aboard your vessel SUPREME, official number 220057.

In accordance with your request, we have carefully reviewed the matter. We find no new facts that were not previously considered in determining the forfeiture amount. However, the Commission has recently reviewed its standards for issuance of forfeitures of this type. *See 1993 Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993). Based on the fact that we have no prior record of unlicensed operation on your part, we are reducing the forfeiture amount to $100. You are ordered, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and Section 1.80(h) of the Commission's Rules, 47 C.F.R. § 1.80(h), to pay $100. The forfeiture should be paid by check or money order sent to:

Federal Communications Commission
P.O. Box 73482
Chicago, IL 60673-7482

To ensure proper credit, please place the number NAL/Acct. No. 215FE0192 on the remittance. The copies of Schedule C of your income tax returns for 1990 and 1991 that you submitted are enclosed.

Sincerely,

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
November 18, 1993

Released: November 26, 1993

Nikkelbord, Broz, Wells & Fryer
Attention: Douglas M. Fryer
1001 Fourth Avenue Plaza, Suite 3300
Seattle, Washington 98154

Re: NAL/Acct. 215AN0001

Dear Sirs:

This is in further response to your October 29, 1992, letter requesting reconsideration of the forfeiture issued to the vessel CAPE ST. JOHN, WTE9496, for operating on an unauthorized frequency in violation of Section 301 of the Communications Act of 1934, as amended, 47 U.S.C. § 301. You requested that the forfeiture be cancelled and a warning letter substituted for it because your client was not aware that such frequency usage was not permissible and made immediate correction upon notification of the violation by removal of the unauthorized channels from the ship's radio equipment.

Although not specifically identified as such, we considered your letter to be a request for higher level review. We have completed that review and note that the operators of the radio station aboard the vessel made an apparently deliberate attempt, when operating on the unauthorized frequency, to obscure their identity by not transmitting any station identification. Furthermore, ship station transmitters will not transmit in the mode and on the frequencies observed unless technically modified to provide such capability. Such intentional technical modification and usage are considered to be willful acts. Claims of unfamiliarity with the regulations cannot be the basis of mitigation of a penalty for such violations.

We do note, however, that Crown Fisheries, Ltd. does not have any prior record of forfeitures for similar violations. Therefore, based on that and the nature of the violation, we are reducing the amount of the forfeiture to $4,000. Neither you nor Crown Fisheries, Ltd. have provided any other information that would merit a further downward adjustment of the forfeiture amount.

Accordingly, your client is ordered to pay a forfeiture of $4,000. This amount is now due and payable immediately. Please submit a check or money order for this amount made payable to the Federal Communications Commission. Place the account number 215AN0001 on the remittance and send it to:

Federal Communications Commission
P.O. Box 73482
Chicago, Illinois 60673-7482

If your client is unable to pay the full amount immediately, you may submit a request to make partial installment payments. Address such a request to:

Federal Communications Commission
Chief, Billings and Collections Branch
Attention: Debt Collection Officer, Room 452
Stop Code 1110A2
1919 M Street, N.W.
Washington, D.C. 20554

Sincerely,

Richard M. Smith
Chief, Field Operations Bureau

cc:
Crown Fisheries, Ltd.
9221 View Avenue, N.W.
Seattle, Washington 98117

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-137

In the Matter of

Amendment of Section 73.202(b), RM-8227
Table of Allotments,
FM Broadcast Stations.
(Hastings, Nebraska)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 1, 1993; Released: November 26, 1993

By the Assistant Chief, Allocations Branch:

1. At the request of Allen's of Hastings Radio ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 3884 (1993), proposing the allotment of Channel 233C2 to Hastings, Nebraska, as the community's second local FM service. Comments in support of the proposal were filed by the petitioner and by Elaine R. Specht. Each stated its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting 233C2 to Hastings since an interest has been expressed in providing the community with its second local FM service.

Engineering Analysis

3. Channel 233C2 can be allotted to Hastings in compliance with the Commission's minimum distance separation requirements with a site restriction of 6.4 kilometers (4.0 miles) northwest to avoid a short-spacing to Station KJCK-FM, Channel 233C1, Junction City, Kansas.[1] The proposal must also conform with the technical requirements of Section 73.1030(c)(1)-(5) of the Commission's Rules regarding protection to the Commission's monitoring station at Grand Island, Nebraska.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 10, 1994**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Hastings, Nebraska	233C2, 268C

5. The window period for filing applications will open on **January 11, 1994**, and close on **February 10, 1994**.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 233C2 at Hastings are North Latitude 40-38-23 and West Longitude 98-25-25.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-223

In the Matter of

Amendment of Section 73.202(b),	RM-8294
Table of Allotments,	
FM Broadcast Stations	
(Indian River Shores, Florida)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 1, 1993; Released: November 26, 1993

By the Assistant Chief, Allocations Branch:

1. Pursuant to the request of deHaro Communications, Inc. ("petitioner"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 8 FCC Rcd 5209 (1993), proposing the allotment of Channel 246A to Indian River Shores, Florida, as that community's first local aural transmission service. Petitioner filed comments restating its intention to apply for Channel 246A, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 246A to Indian River Shores, since it could provide a first local aural transmission service to that community. As indicated in the *Notice*, Channel 246A can be allotted to Indian River Shores in compliance with the Commission's minimum distance separation requirements without a site restriction.[1]

3. Accordingly, pursuant to the authority contained in Sections (4i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 10, 1994**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Indian River Shores, Florida	246A

4. The window period for filing applications will open on **January 11, 1994**, and close on **February 10, 1994**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 246A at Indian River Shores are North Latitude 27-41-10 and West Longitude 80-22-10.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-181

In the Matter of

Amendment of Section 73.202(b),	RM-7696
Table of Allotments,	RM-7817
FM Broadcast Stations.	
(Ashland, California, Rolla	
and Monroe City, Missouri)	

ERRATUM

Released: November 26, 1993

On October 27, 1993, the Commission released an *Order to Show Cause* (DA 93-1192), in the above-captioned proceeding. However, in paragraphs four, five and six, the staff inadvertently referred to Town and Country as the party filing the petition for reconsideration instead of Sobocomo. Accordingly, in order to avoid any confusion, reference to "Town and Country" is corrected to read "Sobocomo" in paragraphs four, five and six of the *Order*.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-286

In the Matter of

Amendment of Section 73.202(b), RM-8377
Table of Allotments,
FM Broadcast Stations.
(Jeffersontown, Shelbyville)
and Richmond, Kentucky)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 29, 1993; Released: November 26, 1993

By the Assistant Chief, Allocations Branch:

Comment Date: January 18, 1994
Reply Comment Date: February 2, 1994

1. The Commission has before it for consideration the petition for rule making filed by Channel Chek, Inc. ("Chek"), licensee of Station WLSY(FM), Channel 269A, Jeffersontown, Kentucky, WCBR Radio, Inc. ("WCBR"), licensee of Station WMCQ(FM), Channel 269A, Richmond, Kentucky, and Shelby County Broadcasting, Inc. ("SCBI"), licensee of Station WTHQ(FM), Channel 267A, Shelbyville, Kentucky, (jointly referred to as "petitioners"). Petitioners propose the substitution of Channel 268C3 for Channel 269A at Richmond, Kentucky, and modification of Station WMCQ(FM)'s license to specify operation on the higher powered channel. In order to accommodate the upgrade at Richmond, petitioners also request the substitution of Channel 267A for Channel 269A at Jeffersontown, Kentucky, and the modification of Station WLSY(FM)'s license to specify Channel 267A; and the substitution of Channel 269A for Channel 267A at Shelbyville, Kentucky, and the modification of Station WTHQ(FM)'s license to specify Channel 269A. Petitioners state their intentions to apply for the respective channels, if allotted.

2. In support of their proposal, petitioners claim that the proposed Class A channel substitutions will enable Stations WLSY(FM) and WTHQ(FM) to operate as 6 kilowatt facilities, and Station WMCQ(FM) will be able to operate as a 25 kilowatt facility. Petitioners note that these stations are precluded from upgrades on their present channels with the existing operation.

3. An engineering analysis has confirmed that all aspects of the proposal comply with the Commission's minimum distance separation requirements. Channel 268C3 can be allotted to Richmond, Kentucky, in compliance with the Commission's minimum distance separation requirements with a site restriction of 2.7 kilometers (1.7 miles) southwest of the community at its authorized transmitter site,[1] in order to avoid a short-spacing to the licensed site of Station WQUT(FM), Channel 268C, Johnson City, Tennessee. Channel 267A can be allotted to Jeffersontown, Kentucky, in compliance with the Commission's minimum distance separation requirements with a site restriction of 6.2 kilometers (3.8 miles) northeast,[2] in order to avoid a short-spacing to Station WKKG(FM), Channel 268B, Columbus, Indiana, and to a construction permit for Station WRZI(FM), Channel 268A, Vine Grove, Kentucky. Channel 269A can be allotted to Shelbyville, Kentucky, in compliance with the Commission's minimum distance separation requirements with a site restriction of 6.1 kilometers (3.8 miles) east,[3] in order to avoid a short-spacing to Station WKYL(FM), Channel 271A, Lawrenceburg, Kentucky.

4. We shall propose to modify the license of Station WMCQ(FM), Richmond; Station WLSY(FM), Jeffersontown, and Station WTHQ(FM), Shelbyville, to specify operation on Channel 268C3 at Richmond, Channel 267A at Jeffersontown, and Channel 269A at Shelbyville, respectively, in accordance with Section 1.420(g)(3) of the Commission's Rules, without entertaining other expressions of interest or requiring the party to demonstrate the availability of an additional equivalent class channel for use by any such interested parties.

5. In recognition of the Commission's policy concerning the involuntary relocation of an authorized transmitter site, petitioners state that they have a joint agreement consenting to share the cost for a change in the authorized transmitter sites for Station WLSY at Jeffersontown and Station WTHQ(FM) at Shelbyville, as well as the proposed exchange of channels. Therefore, no *Order to Show Cause* is necessary.

6. The Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following communities:

	Channel No.	
City	Present	Proposed
Jeffersontown, Kentucky	269A	267A
Richmond, Kentucky	269A	268C3
Shelbyville, Kentucky	267A	269A

7. The Commission's authority to institute rule making proceedings,showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **January 18, 1994**, and reply comments on or before **February 2, 1994** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washing-

[1] The coordinates for Channel 268C3 at Richmond are North Latitude 37-44-09 and West Longitude 84-16-05.
[2] The coordinates for Channel 267A at Jeffersontown are North Latitude 38-13-41 and West Longitude 85-30-30.
[3] The coordinates for Channel 269A at Shelbyville are North Latitude 38-12-48 and West Longitude 85-09-13.

ton, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Harry F. Cole
Bechtel & Cole, Chartered
1901 L Street, N.W., Suite 250
Washington, D.C. 20036
(Counsel for Joint Petitioners)

9. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Channel Chek, Inc.
581 South Third Street
Louisville, KY 40203
(Licensee for WLSY(FM))

WCBR Radio, Inc.
P.O. Box 0
Richmond, KY 40475
(Licensee for WMCQ(FM))

Shelby County Broadcasting, Inc.
301 Iola Road
Louisville, KY 40207
(Licensee for WTHQ(FM))

10. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

11. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate

of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-194

In the Matter of

Amendment of Section 73.202(b),	RM-8255
Table of Allotments,	
FM Broadcast Stations.	
(Esparto, California)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 3, 1993; Released: November 26, 1993

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 8 FCC Rcd 4857 (1993), issued in response to a petition filed on behalf of Esparto Broadcasting ("petitioner") proposing the allotment of Channel 250A to Esparto, California, as that community's first local aural transmission service. Petitioner filed comments in response to the *Notice* No other comments were received.

2. We believe the public interest would be served by allotting Channel 250A to Esparto since it could provide a first local aural transmission service to that community.

Technical Statement

3. Channel 250A can be allotted to Esparto consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules, provided the transmitter is located at least 12.5 kilometers (7.8 miles) northeast of that locality at coordinates 38-45-10 and 121-53-30, to avoid short-spacing to the construction permit issued for Station KMGG(FM), Channel 249B1, Monte Rio, California, at coordinates 38-32-33 and 122-57-37, and to Station KABL-FM, Channel 251B, San Francisco, California, at coordinates 37-51-04 and 122-29-49.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 10, 1994**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include the community listed below, as follows:

City	Channel No.
Esparto, California	250A

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. The window period for filing applications on Channel 250A at Esparto, California, will open on **January 11, 1994**, and close on **February 10, 1994**.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-293

In the Matter of

Amendment of Section 73.202(b), RM-8336
Table of Allotments,
FM Broadcast Stations.
(Harrisburg, Arkansas)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 3, 1993; Released: November 26, 1993

Comment Date: January 18, 1994
Reply Comment Date: February 2, 1994

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Harrisburg Broadcasting ("petitioner") requesting the allotment of FM Channel 240C3 to Harrisburg, Arkansas, as that community's first local aural transmission service. Petitioner stated its intention to apply for Channel 240C3 if allotted to Harrisburg, as requested.

2. A staff review of the proposal reveals that Channel 240C3 can be allotted to Harrisburg consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules provided the transmitter is sited at least 6.8 kilometers (4.2 miles) southeast of the community at coordinates 35-31-23 and 90-39-42. The site restriction is required to avoid a short-spacing to the licensed site of Station KSAR(FM), Channel 240A, Salem, Arkansas, at coordinates 36-22-51 and 91-49-28.

3. We believe the public interest would be served by proposing the allotment of Channel 240C3 to Harrisburg, Arkansas, since an interest has been expressed in providing that community with its first local aural transmission service. Therefore, we will seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, to include Harrisburg, Arkansas, as follows:

	Channel No.	
City	Present	Proposed
Harrisburg, Arkansas	–	240C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 18, 1994**, and reply comments on or before **February 2, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Riley M. Murphy, Esq.
1100 Poydras Street
Suite 2590
New Orleans, LA 70163-2590

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Com-

mission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-195

In the Matter of

Amendment of Section 73.202(b), RM-8274
Table of Allotments,
FM Broadcast Stations.
(Los Molinos, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 1, 1993; Released: November 26, 1993

By the Assistant Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 8 FCC Rcd 4855 (1993), issued in response to a petition filed by Brett E. Miller ("petitioner") proposing the allotment of FM Channel 269A to Los Molinos, California, as that community's first local aural transmission service. Petitioner filed comments in response to the *Notice*.[1] No other comments were received.

2. We believe the public interest would be served by allotting Channel 269A to Los Molinos since it could provide a first local aural transmission service to the community.

Technical Statement

3. Channel 269A can be allotted to Los Molinos consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules, without a site restriction, at coordinates 40-01-12 and 122-05-42.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 10, 1994**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include the community listed below, as follows:

City	Channel No.
Los Molinos, California	269A

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. The window period for filing applications on Channel 269A at Los Molinos, California, will open on **January 11, 1994**, and close on **February 10, 1994**.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the application filing process for Channel 269A at Los Molinos, California, should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] As stated in the *Notice*, petitioner's request, although signed and an address provided, did not verify the statements contained in the petition, as required by Section 1.52 of the Commission's Rules. Petitioner was requested to correct the deficiency in his responsive comments, and has complied accordingly.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 18, 1993

FEE DECISIONS OF THE MANAGING DIRECTOR AVAILABLE TO THE PUBLIC

The Managing Director is responsible for fee decisions in response to requests for waiver or deferral of fees as well as other pleadings associated with the fee collection process. On a monthly basis, a public notice is released and the entire text of these fee decisions is published in the FCC Record.

The decisions are placed in General Docket 86-285 and are available for public inspection. A copy of the decision is also placed in the appropriate docket, if one exists.

The following Managing Director fee decisions are released for public information:

Bullie Broadcasting Corporation - Request for refund of a filing fee for two radio broadcast stations at Hinesville, Georgia - **Denied** (September 28, 1993).

D.E.K.W. Communications, Inc. - Request for refund of a hearing fee for a new FM station at New Albany, Indiana - **Granted** (September 23, 1993).

Green, Dorothy K. - Request for refund of filing fees submitted in connection with applications for authority to modify a radio station at Bay City, Texas - **Denied** (September 28, 1993).

Heartland Communications, Inc. - Request for refund of a filing fee for a radio station at Russell Springs, Kentucky - **Granted** (September 28, 1993).

Mitchell, Trudy M. - Request for refund of a hearing fee for a station at Slidell, Louisiana - **Granted** (October 8, 1993).

Soler Broadcasting - Request for acceptance of an application for a new FM radio broadcast station at Lacrosse, Florida - **Granted** (October 8, 1993).

Wizard Broadcasting Co. - Request for refund of a filing fee for a radio station at Los Lunas, New Mexico - **Granted** (October 13, 1993).

NOTE: ANY QUESTIONS REGARDING THIS REPORT SHOULD BE DIRECTED TO THE PREPARER, CLAUDETTE PRIDE, CHIEF, FEE SECTION ON (202)632-0241.

FEDERAL COMMUNICATIONS COMMISSION

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

SEP 26 1996

J. Geoffrey Bentley, Esq.
Birch, Horton, Bittner and Cherot
1155 Connecticut Avenue, N.W.
Suite 1200
Washington, D.C. 20036

Dear Mr. Bentley:

This is in response to your request for refund of a filing fee submitted on behalf of Bullie Broadcasting Corporation (Bullie) in connection with its transfer of control application for radio broadcast stations WGML(AM) and WHVL(FM), Hinesville, Georgia.

You explain that Bullie's application was accompanied by a filing fee of $1,130.00 and was given a fee control number. You also explain that the application was returned as unacceptable for filing because an obsolete version of FCC Form 315 was used for the application. In addition, you explain that Bullie refiled the application on the current version of FCC Form 315 together with another $1,130.00 filing fee, and that this application has been accepted for filing and is currently under consideration by the FCC.

You now contend that, while this situation is not among those which the FCC has specifically stated will result in refund of fees as enumerated in Section 1.1111(a) of the rules, it is a situation in which the Commission contemplated that no additional fee will result. In support, you state that Section 1.1107(d) provides that where an application is returned for additional information, then no additional fee is required upon resubmission. You also argue that the FCC took no action with respect to Bullie's original transfer of control application other than to return it.

We are unable to refund or return Bullie's fee. The Commission resolved this basic issue when it implemented the Fee Collection Program:

> [E]xcept for the limited instances enumerated in new section 1.1111 of the rules, fees will be retained by the government irrespective of the substantive disposition of the underlying application or filing. Therefore, once an application has cleared the fee review process, its subsequent rejection by the relevant bureaus or offices will not result in a fee refund.

Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, 2 FCC Rcd 947, 949 (1987). Section 1.1111 of the rules does not provide any authority for refund of the filing fee where an application is returned because it was submitted on an obsolete form.

You are correct in stating that Section 1.1107(d) of the Commission's rules provides that no fee payment will be required when an applicant resubmits an application returned for corrections or additional information. However, Bullie did not follow Section 1.1107(d). In light of this omission, we are unable to refund Bullie's fee, particularly at the risk of eroding the Commission's policy against refunding fees under circumstances not specifically provided for under Section 1.1111 of the rules.

Accordingly, your request for fee refund is denied.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

SEP 28 1993

James L. Winston
Rubin, Winston, Diercks,
Harris & Cooke
1730 M Street, N.W.
Suite 412
Washington, D.C. 20036

Re: D.E.K.W. Communications, Inc.
New Albany, Indiana
Fee Control # 9205088170358001

Dear Mr. Winston:

This is in response to your request for refund of the fee submitted in the above-referenced matter.

Your request is granted. We have reviewed the facts surrounding your filing and have concluded that a refund is warranted pursuant to Section 1.1111 of the Commission's rules. 47 C.F.R. §1.1111. The subsection checked below is specifically applicable to your request.

_____ No fee is required for the above referenced submission (§1.1111(a)(1)).

_____ An insufficient fee has been submitted with the application/filing (§1.1111(a)(2)).

_____ The applicant cannot fulfill the prescribed age requirement (§1.1111(a)(4)).

_____ The Commission has adopted a new rule that has nullified the application after its acceptance for filing (§1.1111(a)(4)).

_____ A new law or treaty has rendered useless a grant or other positive disposition of the application (§1.1111(a)(4)).

_____ The application was not timely filed in accordance with the filing window as established by the Commission (§1.1111(a)(6)).

_____ In the case of a broadcast applicant, the application was granted without being designated for hearing (§1.1111(b)(1)).

_____ In the case of a broadcast applicant, the application was dismissed prior to designation for hearing or in the order designating the case for hearing (§1.1111(b)(2)).

__X__ In the case of a broadcast applicant, the application was dismissed for failure to file a Notice of Appearance (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding to file a Notice of Appearance and the application was immediately grantable (§1.1111(b)(3)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding who filed a Notice of Appearance and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for the dismissal of all but the above-referenced application, and the application was immediately grantable (§1.1111(b)(4)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for dismissal of all but the above-referenced application and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(4)).

A check, made payable to the maker of the original check and drawn in the amount of $6,760, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

SEP 28 1993

Ms. Dorothy K. Green
Rt. #1, Box 138A
Smithville, Texas 78957

Dear Ms. Green:

This is in response to your request for refund of the fees that you submitted in connection with your applications for authority to modify your radio station, licensed in the Public Land Mobile Radio Service (PLMRS).

You now seek refunds of these fees because you have withdrawn your applications and will no longer operate the PLMRS station.

I regret to inform you that your request may not be granted. Section 1.1111 of the Commission's rules governing fee refunds makes no allowance for refund of a fee payment upon withdrawal of an application. 47 C.F.R. § 1.1111. Moreover, the Commission has explicitly stated that a refund will not be granted once an application has cleared the fee review process without regard to the disposition of that application. See Establishment of a Fee Collection Program, 2 FCC Rcd 947, 949 (1987), Recon. denied, 3 FCC Rcd 5987 (1988).

Accordingly, your request is denied.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

SEP 28 1993

John Wells King, Esq.
Haley, Bader & Potts
4350 North Fairfax Drive
Suite 900
Arlington, Virginia 22203-1633

Dear Mr. King:

This will respond to your request for refund of a fee filed on behalf of Heartland Communications, Inc., ("Heartland"), the assignee of a construction permit for WTCO-FM, Russell Springs, Kentucky, in connection with its application for extension of time to construct.

In the case of an assignment, section 73.3535 of the Commission's rules affords an assignee of a construction permit additional time in which to construct. Accordingly, the Bureau returned Heartland's extension application because the construction period had not expired. Under the circumstances, since Heartland was not required to file the extension application, refund of the filing fee is warranted. See 47 C.F.R. §1.1111(a).

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $200.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

OCT 8 1996

Eugene T. Smith, Esq.
715 G Street, S.E.
Washington, D.C. 20003

Re: Trudy M. Mitchell
Slidell, Louisiana
Fee Control # 9107178170291022

Dear Mr. Smith:

This is in response to your request for refund of the fee submitted in the above-referenced matter.

Your request is granted. We have reviewed the facts surrounding your filing and have concluded that a refund is warranted pursuant to Section 1.1111 of the Commission's rules. 47 C.F.R. §1.1111. The subsection checked below is specifically applicable to your request.

_____ No fee is required for the above referenced submission (§1.1111(a)(1)).

_____ An insufficient fee has been submitted with the application/filing (§1.1111(a)(2)).

_____ The applicant cannot fulfill the prescribed age requirement (§1.1111(a)(4)).

_____ The Commission has adopted a new rule that has nullified the application after its acceptance for filing (§1.1111(a)(4)).

_____ A new law or treaty has rendered useless a grant or other positive disposition of the application (§1.1111(a)(4)).

_____ The application was not timely filed in accordance with the filing window as established by the Commission (§1.1111(a)(6)).

_____ In the case of a broadcast applicant, the application was granted without being designated for hearing (§1.1111(b)(1)).

_____ In the case of a broadcast applicant, the application was dismissed prior to designation for hearing or in the order designating the case for hearing (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the application was dismissed for failure to file a Notice of Appearance (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding to file a Notice of Appearance and the application was immediately grantable (§1.1111(b)(3)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding who filed a Notice of Appearance and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)).

__X__ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for the dismissal of all but the above-referenced application, and the application was immediately grantable (§1.1111(b)(4)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for dismissal of all but the above-referenced application and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(4)).

A check, made payable to the maker of the original check and drawn in the amount of $6,760, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

OCT 2 1993

José David Soler, Esq.
P.O. Box 316
Coamo, Puerto Rico 00769

Dear Mr. Soler:

This letter responds to your request for acceptance o application filed by Soler Broadcasting (Soler) for a radio broadcast station at Lacrosse, Florida.

You state that on April 13, 1993, Soler paid the fili its application in the form of three separate U.S. Po money orders. You also state that this application w with instructions to pay the filing fee by a single instrument. You subsequently re-filed Soler's application on May 14, 1993 with a single check in the amount of $2,030.

Soler's re-filed application was submitted outside the filing window for the Lacrosse, Florida allotment, and therefore will be dismissed as untimely. However, the Mass Media Bureau has requested that the Managing Director determine whether Soler's original application was filed in compliance with the Commission's fee rules. In this regard, the Commission has explained that, under certain limited circumstances, multiple payment instruments will be accepted as an exception to the single payment instrument rule found in Section 1.1108(b) of the rules. 47 C.F.R. § 1.1108(b). Section 1.1108(c) states that the Commission may accept multiple money orders in payment of a fee for a single application where the fee exceeds the maximum amount for a money order and the use of multiple money orders is the only practical method of payment. 47 C.F.R. § 1.1108(c).

We conclude that Soler's original application was filed in accordance with Section 1.1108(c) of the rules. Because Soler's original application properly should not have been returned by the Commission, the fact that Soler re-filed its application outside the filing window is irrelevant. Soler states in its original filing that the application fee was being paid by three money orders in the amount of $700, $700 and $630, due to the fact that the U.S. Postal Service issues money orders up to $700 only, and that this was the only practical method of payment.

Accordingly, Soler's application will be reinstated nunc pro tunc. If you have any questions about this fee decision, please call the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

OCT 13 1993

Barry D. Wood, Esq.
Jones, Waldo, Holbrook
& McDonough
2300 M Street, N.W.
Suite 900
Washington, D.C. 20037

Dear Mr. Wood:

This is in response to your request for refund of a filing fee submitted on behalf of Wizard Broadcasting Co. (Wizard), in connection with its April 1, 1993 application for extension of construction permit for Station KOYT(FM) in Los Lunas, New Mexico.

You explain that Wizard was compelled to file the above-referenced extension application and pay the $200.00 filing fee only because the FM Branch did not extend the KOYT permit after the consummation on November 10, 1992 of the assignment of the permit. You also explain that, by letter of June 16, 1993, the FM Branch expressly stated that Section 73.3535(c) allowed a 12 month extension of the construction permit running from the date of consummation of the assignment, November 10, 1992, and returned Wizard's April 1, 1993 extension application as "premature." Consequently, you now seek refund of the $200.00 filing fee that Wizard tendered with its extension application.

This situation is analogous to that found in Section 1.1111(a)(6), which allows the refund of fees for applications that are submitted outside the appropriate window. In view of the June 16, 1993 letter from the FM Branch concluding that Wizard's extension application was premature, we are predisposed to grant its request for fee refund.

Accordingly, your request for refund of the filing fee is granted. A check, for $200, payable to the maker of the original check, will be forwarded to you at the earliest practicable time. If you have any questions about this refund, please call the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 93-458
Washington, D.C. 20554

In the Matter of	)	
	)	
Evaluation of the Syndication	)	MM Docket No. 90-162
and Financial Interest Rules	)	

MEMORANDUM OPINION AND ORDER

Adopted: September 23, 1993; Released: October 22, 1993

By the Commission: Chairman Quello dissenting in part and issuing a statement; Commissioner Barrett issuing a statement.

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I. Introduction

1. In this Memorandum Opinion and Order, we address the issues raised in five petitions for reconsideration of our Second Report and Order (Second R&O), 8 FCC Rcd 3282 (1993), which amended the financial interest and syndication ("finsyn") rules set forth at 47 C.F.R. §§ 73.659 - 73.662,

73.3526(a)(11).[1] For the most part, the petitions and responsive pleadings reiterate arguments that we considered and rejected in our Second R&O. After careful review, we find no new evidence warranting fundamental changes in the rules as adopted. To the extent that new arguments have been made, particularly with respect to our decision in the Second R&O to exempt emerging networks from most finsyn restrictions and to schedule a timetable for expiration of all finsyn constraints, we are, with a few minor exceptions, also unpersuaded that the rules should be changed. Thus, by this Memorandum Opinion and Order, we deny most aspects of the petitions before us. We do, however, make minor adjustments to the reporting requirements set forth in Section 73.661 of our Rules, and we make a technical correction to the language of Section 73.660(a) of our Rules. In addition, we have decided to codify in new Section 73.663 the approach adopted in the Second R&O toward scheduling the expiration of the finsyn rules. See generally Appendix A (setting forth amendments adopted herein to the finsyn rules).

II. Background

2. We initiated this proceeding in 1990 to determine whether modification of the finsyn rules was warranted. Those rules, originally adopted in 1970, placed significant restrictions on the ability of the established networks (ABC, CBS and NBC) to own programming and engage in the practice of syndication. The Commission had imposed these restraints to limit network control over television programming and thereby encourage the development of a diversity of programs through diverse and antagonistic sources of program services.[2] In 1991, the Commission declined to substantially repeal the 1970 finsyn rules, but did relax them, observing that the role and power of the three established networks had diminished, that cable television had emerged as a competitive force, and that the fundamental objectives of the rules -- to foster a robust syndication industry and to

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[1] Petitions for reconsideration were filed by the following parties: the Association of Independent Television Stations, Inc. (INTV); CBS Inc. (CBS); Chris-Craft Television, Inc., United Television, Inc. and Tribune Broadcasting Company (the Independent Stations); the Coalition to Preserve the Financial Interest and Syndication Rule (the Coalition); and National Broadcasting Company, Inc. (NBC). In response, the following parties filed Oppositions: Capital Cities/ABC, Inc. (ABC); CBS and NBC (jointly); the Coalition; the Independent Stations; INTV; FBC Television Affiliates Association (Fox Affiliates); Fox Broadcasting Company (Fox); and Program Producers and Distributors Committee (PPDC). In addition, King World Productions, Inc. (King World) filed an opposition styled as "Comments," which we will refer to as the King World Opposition. The following parties filed Replies: CBS; the Coalition; the Independent Stations; and INTV.

[2] See Network Television Broadcasting, 23 FCC 2d 382, 400 (1970), aff'd sub nom. Mt. Mansfield Television v. FCC, 442 F.2d 470 (2d Cir. 1971).

prevent extraction of rights from non-network producers -- had been advanced.[3] Despite these advances, a majority of Commissioners remained concerned that the underlying objectives of the rules could not be achieved fully in the absence of such rules.[4] Accordingly, the Commission took a measured approach toward relieving the restrictions under which the networks operate.

3. On appeal, the United States Court of Appeals for the Seventh Circuit ("Court" or "Seventh Circuit") vacated our 1991 R&O, except insofar as we abrogated the 1970 finsyn rules. See Schurz Communications v. FCC (Schurz), 982 F.2d 1043 (7th Cir. 1992). In the Court's view, the R&O failed to explain adequately how the 1991 rules satisfied the Commission's goals of program source and outlet diversity, or why we rejected certain network arguments raised during the course of the proceeding. In response to the Court's action, we sought additional public comment on the general and specific issues cited in the Schurz decision. After due deliberation and review of the record, the Court's opinion and ongoing changes in the marketplace, we amended the finsyn rules again, issuing the Second R&O under reconsideration here. We stated our view that these new finsyn rules "comport more accurately with the weight of the evidence presented in this proceeding, address the concerns cited by the Seventh Circuit in Schurz, and constitute the best approach for furthering our goals of diversity and competition."[5]

4. Our current finsyn rules place no restrictions on network acquisition of financial interests and passive syndication rights ("back-end rights") in network programming, except for certain reporting requirements. There are also no limits on the amount of "in-house"[6] programming a network can produce and distribute through its network distribution system, and no restrictions on network ownership and syndication of all non-prime time network programming and all non-entertainment network programming (whether prime time or not). Active syndication by a network of prime time entertainment network programming, however, along with network participation in the first-run syndication market, is circumscribed. More specifically, the networks are prohibited from actively syndicating prime time entertainment network programming or first-run non-network programs to television stations within the United States. Any such program for which a network holds syndication rights must be syndicated domestically through an independent syndicator. Moreover, a network cannot hold or acquire a continuing financial

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[3] See Report and Order (R&O) in MM Docket No. 90-162, 6 FCC Rcd 3094, 3099, as modified, Memorandum Opinion and Order (First MO&O), 7 FCC Rcd 345, 348 (1991).

[4] Former Chairman Sikes and Chairman Quello dissented from the majority's decision in the R&O to retain a substantial portion of the finsyn restrictions.

[5] Second R&O, 8 FCC Rcd at 3284.

[6] "In-house" productions refer to co-production arrangements between a network and an outside domestic or foreign producer, as well as programming produced solely by a network.

interest or syndication right in any first-run, non-network program distributed in the United States unless the network has solely produced that program.

5. With respect to foreign markets, the networks may purchase, without restriction, foreign syndication rights in off-network programming distributed outside of the United States and first-run programming distributed solely outside the United States. Under these same conditions, the networks may also engage in active syndication abroad. The networks may also purchase foreign syndication rights in, including active syndication of, first-run programming in foreign markets even if the program is also distributed domestically, so long as the network has produced the programming solely in-house.

6. In promulgating the above-described rules, we relaxed major aspects of the 1991 regime. Most significant was our decision to remove virtually all restrictions on network acquisition of back-end rights in network programming. While the 1991 rules allowed some such acquisitions, these rules required waiting and "cooling off" periods between stages of negotiation, barred network-initiated co-production arrangements with outside producers, and imposed certification requirements.[7] Another significant change from the 1991 rules was our adoption of a mechanism for removing all remaining finsyn regulation. Specifically, the restrictions will expire two years after similar restrictions set forth in consent decrees that currently bind CBS, ABC and NBC are lifted by the U.S. District Court that has jurisdiction over those decrees.[8] We also relaxed the 1991 rules by exempting emerging networks from finsyn constraints, except for reporting requirements that are triggered once the emerging network provides 16 hours of prime time programming per week to interconnected affiliates.

7. While, on the whole, we created a less restrictive finsyn regime than the one we had adopted in 1991, we did extend the 1991 prohibition on active network syndication to all domestic syndication, regardless of whether the network had produced the program in-house or acquired it from an outside producer. Under the 1991 rules, the networks were permitted to syndicate actively their prime time entertainment shows that were produced in-house and aired on their own networks, although a companion restriction imposed a 40

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[7] More specifically, under the 1991 approach, networks could not purchase financial interest and syndication rights in outside productions except in negotiations separate from, and initiated no less than 30 days after, execution of the network license fee agreement (the "30-day negotiations separation requirement"). Co-production arrangements could only be initiated by the outside producer, who was given a 30-day "cooling off" period before the arrangement would become binding. The networks were also required to certify that access to their schedules were not conditioned on the acquisition of finsyn rights.

[8] For a more detailed description of this framework, see infra para. 10. We note here that an integral feature of the Commission's approach is a review of the finsyn rules scheduled to begin eighteen months after the District Court lifts the relevant restrictions of the consent decrees.

percent cap on the use of such programming in a network's prime time schedule to counter the resulting incentive for networks to produce most of their own prime time schedules.[9] To prevent the networks from abusing their 1991 opportunities to syndicate programming actively, however, we had imposed restrictions against affiliate favoritism and warehousing practices.[10]

8. In the Second R&O, we revisited our approach toward active network syndication and concluded that more cautious treatment was appropriate in the interests of diversity and competition, particularly in light of our companion decision to lift virtually all restrictions on acquisition of back-end rights in network programming.[11] In addition, we recognized that the revised restrictions on active syndication obviated the need for either the 40 percent programming cap or the affiliate favoritism restraints, both of which we consequently eliminated.[12] In contrast, we retained the anti-warehousing safeguard, recognizing that the network ban on active syndication would have no proscriptive effect on a network's ability to warehouse programming.[13] We also observed that under this new regime, the rules were not only simpler, but they also avoided interfering with the networks' prerogatives to compose their prime time schedules with as much in-house programming as they deemed appropriate.[14] Finally, we indicated that modification of the 1991 approach toward active syndication and the consequent return to a more restrictive regime in this area would not disrupt any network syndication activities undertaken between 1991 and 1993 because the consent decrees (described above) have independently barred the networks from active syndication during this

---

[9] For the domestic market, the 1991 rules did, however, prohibit networks from actively syndicating any outside productions or in-house productions aired on another network. See R&O, 6 FCC Rcd at 3136-37. Moreover, like the 1993 rules, the 1991 rules required a network to use an independent syndicator to distribute any programming in which the network had syndication rights but was itself barred from syndicating actively.

[10] The affiliate favoritism restrictions prohibited network syndication of prime time entertainment programs to any affiliated station on terms or conditions that were more favorable than those offered to other non-affiliated stations, and established a rebuttable presumption of favoritism if productions in which a network had an interest were syndicated to network owned or affiliated stations in more than thirty percent of the markets where the program was sold. See 47 C.F.R. § 73.660(b)(1991). The anti-warehousing safeguard required a network to release into syndication a program for which it held syndication rights four years after the program's network debut or within six months following the end of the network run, whichever was sooner. See 47 C.F.R. § 73.660(c)(1991).

[11] See Second R&O, 8 FCC Rcd at 3317-18.

[12] See id. at 3312-13.

[13] See id. at 3322-23.

[14] See id. at 3317.

period.[15]

9. As described in detail below, the petitions for reconsideration challenge most aspects of the finsyn regime adopted in the Second R&O.

III. Discussion

A. Review and Expiration of the Rules

10. In the Second R&O, we retained the remaining FCC finsyn restrictions until two years after the entry of an order by the U.S. District Court, Central District of California ("District Court"), granting the networks' motions to modify certain restrictions of the consent decrees that now limit, independent of FCC rule, network participation in the financial interest and syndication areas.[16] The Commission stated that it would launch an inquiry eighteen months after the District Court removed these consent decree restrictions to provide an opportunity for comment to those who believe that retention of restrictions is warranted. The burden of proof in that proceeding will be on proponents of retaining the rules. We stated that unless the Commission issued an order to the contrary, all remaining finsyn restrictions would expire six months after we launched this review.

11. Petitions and Responsive Pleadings. Four parties -- INTV, the Coalition, King World, and the Independent Stations -- oppose the review and expiration framework we established in the Second R&O. These parties object both to the fact that the rules are scheduled to expire at a set time absent affirmative contrary action by the Commission, and to the burden of proof assigned to the proponents of retention. In addition, these parties contend that the timing of the review process is too short. For example, INTV argues that the Commission should wait at least five years after the consent decrees are lifted before launching the review, and the Independent Stations argue for four years. Generally speaking, such opponents take the position that the rules should remain intact until the Commission renders an affirmative decision, after an appropriately timed review proceeding, on the need for rules in their present or modified form.

12. The three traditional networks, on the other hand, argue that the rules should be abolished in their entirety, and that the Commission's

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[15] See id.

[16] See Second R&O, 8 FCC Rcd at 3284, 3338; United States v. National Broadcasting Co., 449 F.Supp. 1127 (C.D. Calif. 1978), aff'd, 603 F.2d 227 (9th Cir. 1979) (table), cert. denied, 444 U.S. 991 (1979); United States v. CBS, Inc., 45 Fed. Reg. 34464 (1980); United States v. American Broadcasting Companies, 45 Fed. Reg. 58411 (1980). As we noted in the Second R&O, the networks have filed motions, supported by the Department of Justice and under consideration by the District court, to lift the restrictions of Sections IV and VI(A) of the consent decrees, which essentially replicate the Commission's 1970 finsyn rules. See Second R&O, 8 FCC Rcd at 3284 n.3.

approach is therefore unnecessary. To the extent that the Commission decides to retain the rules, however, the networks oppose lengthening the time before the rules expire, compromising the automatic dimensions of the expiration, or altering the burden of proof assigned by the Commission. The networks argue that the scheduled review ensures that the FCC will have the opportunity to take one last look at the rules before they expire. According to ABC, there is no reason to presume that the FCC will deliberately default on its stated intention to conduct an adequate review, and that if factors prevent the Commission from conducting the review in a timely fashion, the finsyn proponents may request that the Commission temporarily extend the rules.[17] Similarly, ABC contends that the scheduled review is the appropriate forum to review alternatives to complete repeal.[18]

13. The non-network opponents of our framework cite several specific reasons for their opposition. First, they argue that an automatic expiration does not provide the FCC, at that time, with an adequate opportunity to make an informed decision about the continuing need for finsyn restrictions in either their current or a modified form. According to these parties, the review and expiration mechanism was predicated on the Commission's determination that these restrictions are currently necessary to prevent network behavior that, in approximately two years, will no longer jeopardize the public interest. As a matter of administrative law, however, these parties argue that the Commission is prohibited from changing or eliminating rules without current supporting relevant data and a reasoned analysis concluding that retention of the rules is unwarranted. Such opponents thus argue that since the Commission did not provide such data and analysis justifying elimination of the rules approximately two years hence, and since the Second R&O "provides convincing justifications for maintaining" the finsyn restrictions, establishing at this time an expiration date for the rules is unlawful.[19] In addition, parties like the Coalition argue that such an approach is arbitrary because the FCC cannot predict with any certainty that the present potential for abuse will disappear in two years.[20]

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[17] See ABC Opposition at 17-18. In reply, the Coalition argues that it is by no means certain that the Commission would grant such a temporary extension, and that the review will be meaningless if the restrictions expire before the review is complete. See Coalition Reply at 9-10. The Independent Stations add that the FCC has clearly given itself the option of permitting the rules to lapse without issuing an order justifying expiration of the rules, in violation of the Administrative Procedure Act (APA) and case law. See Independent Stations Reply at 2-3.

[18] See ABC Opposition at 18 n.37.

[19] Independent Stations Petition at 6 (emphasis in original); see also id. at 4-5; King World Comments at 5-6 and 9-12; Coalition Petition at 20.

[20] Coalition Petition at 20-21; see also King World Comments at 10-12. The Coalition and others also argue that the Commission's earlier Report and Order in this Docket rejected a sunset approach on the grounds that the record did not support total repeal, and that establishing a sunset in what is an

14. Second, the non-network opponents argue that it will be impossible for any meaningful information about network behavior to develop within a two-year period after the consent decrees are lifted.[21] These parties contend that the Commission cannot gauge the effect of the networks' freedom under the new rules to acquire financial interests in programs until such programs enter the syndication market. According to the Independent Stations, since a program must enjoy a network run of approximately four to five years before it can be syndicated, the Commission should not conduct its review or allow the rules to expire until at least that amount of time has passed.[22] By waiting at least four years after the consent decrees are lifted, according to INTV, the Commission will be able to observe the "patterns of distribution of programming in which the networks hold financial interests and which are distributed by syndicators who are supposed to be independent of the networks."[23] While the Independent Stations acknowledge that the Commission will be able to review patterns of network program acquisition during the two-year period after the consent decrees are lifted, and that the information thus gathered may cast some light on the potential for anticompetitive network practices in syndication, they argue that such information is of limited use: "The dynamics of, and network incentives involved in program acquisition are fundamentally different than those at work in program distribution."[24] According to the Independent Stations, networks have a greater long range incentive to behave anticompetitively toward their direct competitors (e.g., unaffiliated broadcast stations) than their program suppliers.

15. Third, the Coalition argues that even if the Commission retains a mechanism for the review and expiration of the rules, neither the warehousing restriction (Section 73.660(c)) nor the reporting requirements should expire.

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inherently unpredictable situation would be arbitrary. See Coalition Petition at 19; Independent Stations Petition at 3; King World Comments at 8. King World adds that the Commission acted unlawfully by failing to provide an explanation for what King World characterizes as the Commission's reversal of position on this point in the Second R&O. King World Comments at 9-10.

[21] See, e.g., Independent Stations Petition at 10-11; INTV Petition at 5-6.

[22] See Independent Stations Petition at 9-11.

[23] See id. at 10. According to the Independent Stations, a two-year review period does not cover even one cycle of the television program distribution process. Id. The Independent Stations also stress that, at the time of the scheduled review, the Commission will, in fact, only be able to assess approximately eighteen months (not two years) of network acquisitional behavior under the new rules, because the comment cycle for the review will end soon after the review is launched, eighteen months after the consent decrees are lifted and the networks can begin acquiring financial interests. Id. at 10-11.

[24] Independent Stations Petition at 11.

In addition, the Coalition urges the Commission to replace the expiring active syndication ban with a behavioral prohibition on network favoritism toward affiliates. In support of its position, the Coalition contends that (a) the networks will continue to have an incentive to warehouse programming after the rules expire, (b) without the syndication ban, the networks will have the incentive and ability to favor their affiliates, and (c) the need for reporting requirements will increase as substantive restrictions are removed. The Coalition also argues that the reporting requirements will serve no useful purpose if they expire in approximately two years, because the Commission will be unable to assess, at the scheduled time of review, how the major networks handle active syndication (from which they are barred until after the review and expiration of the rules). Finally, the Coalition notes that its proposals are consistent with the Commission's cautious stance toward elimination of the rules and provide a reasonable safety net of regulation.

16. In addition to the networks' general position that our framework is unwarranted because the rules should be eliminated now, NBC raises two specific objections. First, NBC argues that tying the expiration of the rules to the lifting of the consent decrees is inconsistent with the FCC's pronouncements in the 1991 R&O in this Docket, where the Commission stated that its assessment of the need for rules was not based on antitrust principles or competition policy, but on its public interest mandate to account for diversity in programs and program sources. NBC contends that the FCC must explain why the consent decrees, which are antitrust-based, should play such a pivotal role in the new finsyn regulatory scheme. Second, NBC questions the logic of the Commission's caution in retaining syndication restrictions until the networks demonstrate how they are participating in the financial interest area. NBC points out that the abuses historically feared by the FCC with respect to network acquisition of financial interests in programming (e.g., improper extraction of profits), differ materially from the abuses cited in connection with syndication activities (e.g., warehousing and affiliate favoritism). Thus, NBC argues that even if the networks acted abusively by unfairly extracting profits during the course of negotiations over financial interests, it would not follow that the networks would or could disserve the public interest by warehousing programs or favoring their affiliates in the syndication market.

17. Decision. The non-network opponents of our review and expiration framework have fundamentally misconstrued the basis for our retention of restrictions on active network syndication and network participation in the first-run market. Based on our review of the entire record, we concluded that current market conditions alone do not justify retention of the 1991 finsyn restrictions. At the same time, we recognized that it is impossible to be certain that the dangers discussed at length in this proceeding will not come to pass. We were, however, able to identify those areas where we were most certain that harm from such dangers would not occur. As we stated in the Second R&O:

> [W]e have identified and are removing the portion of the finsyn rules whose elimination appears least likely to cause such harm and most likely to create positive effects -- i.e., the restraints on network acquisition of financial interests and passive syndication rights, and

all restraints in connection with programs distributed in foreign markets.[25]

18. With respect to active network syndication of prime time entertainment off-network programs and network involvement in the first-run market, however, we viewed the risks of deregulation as having "a closer nexus to our traditional interest in diversity that could be adversely affected if our predictions prove inaccurate."[26] The "predictions" to which we referred were not simply predictions that the market would, in two years, develop to the point of justifying elimination of the remaining finsyn constraints. Indeed, we determined that current market conditions would justify removal of these constraints were it not for several critical non-market factors. First, we predicted that the networks would not behave in ways detrimental to diversity and competition if the constraints were lifted now, but we could not be absolutely certain that lifting the constraints would cause no harm. Second, a more cautious approach appeared to be warranted with respect to syndication because of the more significant risk of damage to outlet diversity in the event that we prematurely removed these last restrictions. In addition, a third factor played into our decision to take a phased approach toward lifting the finsyn rules: we recognized that immediate elimination of all the rules could be disruptive and have unintended and unforseen negative effects, given the fact that the finsyn regulatory scheme has been in place for over two decades. During this time, industry participants have come to rely on the structure imposed by that regulatory scheme.

19. In view of these three factors, we concluded that it would be irresponsible to remove all restrictions at the current time. Instead, we deemed it appropriate to proceed somewhat cautiously, to ensure, insofar as possible, that the modifications of the restrictions would be smoothly integrated into industry practices without harming the public interest. Moreover, while recognizing that the first factor (lack of certainty) will always be present when an agency removes restrictions on a market, we sought to reduce its force by taking a phased approach toward deregulating in this area. Thus, we indicated that our lack of certainty regarding the danger of removing the active syndication and first-run constraints would be reduced if, after two years of network participation in the program acquisition market, there were no unintended negative consequences. Accordingly, we scheduled a review as an additional safeguard to gauge as responsibly as possible whether our conclusion regarding the state of the 1993 market -- that it can operate effectively without finsyn restrictions -- and of developing market trends was accurate.

20. In view of the above, the principal objection to our review and expiration mechanism raised by the non-network petitioners is without merit.

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[25] Second R&O, 8 FCC Rcd at 3337.

[26] Second R&O, 8 FCC Rcd at 3337-38. For example, we observed that fresh off-network and first-run syndicated product is essential to the health of independent stations, who provide a vital alternative voice to viewers. Id. at 3338-39.

In essence, they argue that the Commission has acted unlawfully by scheduling the elimination of rules without providing a reasoned basis to justify their elimination. As we have explained, the bases for the scheduled elimination of the rules are set forth in the Second R&O, which concluded that current market conditions alone do not justify continuation of the finsyn regime.[27] Moreover, since the scheduled elimination of the rules is based upon our conclusions about the current state of the market -- conclusions reached after extensive proceedings and full opportunity for comment -- it is appropriate to place the burden of proof on those who seek to overturn these conclusions at the time of our review. Furthermore, the Coalition's request to extend existing or modified portions of the finsyn rules past the expiration date (i.e., the anti-warehousing safeguard, the reporting requirements and a behavioral restriction against affiliate favoritism) will be unnecessary unless it is demonstrated at the time of review that our conclusions in the Second R&O about the current market are in error.

21. Given our view of the market, we have tried to give the networks the greatest possible leeway while still crafting an approach that would give us some indication how the market will, in practice, respond to network entry. Thus, as indicated above, we reject proposals to retain or add restrictions. While a number of parties have argued that the two-year period is too short for enough information to develop to enable the Commission to conduct a meaningful review, this time frame will allow us to observe some degree of network acquisition of financial interests. In addition, we expect the Fox network to qualify as an emerging network in the near future, and to begin, soon thereafter, to become subject to the reporting requirements. Since Fox is not otherwise constrained by the finsyn restrictions, we expect to obtain useful information about that network's syndication activities. Moreover, since the three established networks will not necessarily limit themselves to purchasing syndication rights in newly-launched programs, we may see their participation in syndication by the time of review. More importantly, we are not using the review period as a testing ground for observing specifically how networks handle their limited role in syndication. Rather, we will review their behavior in the program acquisition market primarily, where the most

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[27] Similarly, the Second R&O adequately supports our modification of the 1991 approach toward phasing out the rules. The Commission reevaluated and expressly reversed the 1991 conclusions which rejected a sunset on the assumption that the market would not function competitively absent some level of finsyn regulation, and that we lacked sufficient assurance to predict how or when competition would develop. In the Second R&O, we determined that the market is presently structured to function competitively in the absence of the rules. In view of these conclusions, petitioners' APA objections are without merit. See Tenneco Gas v. FERC, 969 F.2d 1187, 1209-10 (D.C. Cir. 1992) (rejecting as nearly frivolous petitioners' argument that a similar sunsetting requirement is beyond agency discretion). As indicated above, the Second R&O contains ample justification for permitting the rules to expire on a scheduled basis. Moreover, the review that we have committed to undertake will provide an additional and appropriate safeguard to ensure that the Commission has an opportunity to extend the life of the rules if changing circumstances warrant. Id. at 1210.

discernible activity will occur. If that behavior appears to reflect an unanticipated degree of market power, we will regard that evidence as a strong indication that our overall marketplace analysis may have been misplaced.[28]

22. The networks' general opposition to our framework is based on the view that all finsyn restrictions should be eliminated at once.[29] As explained in detail above, this course of action would be unwise and would unnecessarily jeopardize the public interest. NBC also objects to the linkage between the end of our rules and the lifting of the consent decrees. This linkage, however, is an essential practical component of our decision not to strip away all finsyn constraints until we have had some opportunity to review an empirical showing by opponents of elimination about network market behavior under the modified rules.[30] Until the consent decrees are lifted, it will be virtually impossible for the Commission to verify its predictions about such behavior. Thus, we stated in the Second R&O:

> Because these consent decrees duplicate the Commission's 1970 finsyn rules, we will not have an opportunity to measure the competitive impact of removing our own restrictions unless and until the consent decrees are modified. Thus, attempting to establish a unilateral, Commission-imposed timeline for review and possible expiration of our own rules is in most respects an academic exercise. We believe, therefore that a

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[28] Petitioners on both sides of the issues have raised the argument that the differences between program acquisition and syndication make it difficult if not impossible to reach any conclusions about one from data emanating from the other. Compare Independent Stations Petition at 11 ("The dynamics of, and network incentives involved in program acquisition are fundamentally different than those at work in program distribution") with NBC Petition at 6 (arguing that the abuses historically feared in the context of program acquisition are completely different from those in the syndication context). As INTV indicates, however, network purchases of back-end rights may certainly bear on the network's future role in the syndication market. INTV Opposition at 19. More to the point, however, we intend to use the opportunity for review not so much to ascertain whether the networks are abusing their market position in syndication, but in program acquisition, where we were more certain that the market was competitive. To the extent that network behavior in the latter market appears competitive, it would merely confirm the accuracy of our determinations in the Second R&O.

[29] We take this opportunity to note that to the extent we indicated otherwise in the Second R&O, we did not in fact schedule the expiration of the rules at a future date because we saw a need for the market to develop further than it has. Rather, we viewed the developing market trends as confirmation of our assessment that the current market could function competitively in the absence of finsyn restrictions. However, we postponed expiration of the rules and established a review process because of the non-market reasons discussed above at paragraphs 18 and 19.

[30] We intend to treat and address pleadings submitted by such opponents similarly to a petition for rule making.

more practical and workable transition can be achieved if we link our final review of these rules, and their expiration, to the actions of the Consent Decree Court.[31]

As the above quotation indicates, we did not link the final review and expiration of the rules to the consent decrees because of any close relationship of the rules to antitrust principles, as NBC asserts, but rather for very practical reasons.[32] Thus, on this point, there is no inconsistency between the 1991 R&O and our decision in the Second R&O.

B. Network Acquisition of Back-End Rights

23. When the Commission eliminated the 1991 restrictions on network acquisition of back-end rights in network prime time entertainment programming, we concluded that our 1991 market analysis was too narrow, and that program producers are not so limited in finding buyers for their products to justify continued restraints on network participation in the purchase of these back-end rights. To the contrary, the record revealed a host of existing and emerging alternative outlets for program producers, serving to ensure that the three established networks cannot reduce producer profits below a competitive level or otherwise extract concessions that producers generally would not give in a competitive market.

24. Moreover, we determined that competition among the networks themselves acts as an additional constraint on their exercise of market power, and we observed that the decline in network audience share demonstrates further erosion of their power. Furthermore, we concluded that the 1991 restrictions in this area are not only inherently ineffective as a means of restraining any network power that might exist, but they also work to the detriment of our goal of fostering source and program diversity by eliminating the networks as effective sources of financing for producers. And, in fact, we discerned from the record that the production community has become increasingly concentrated over the course of the finsyn regime.

25. Petitions and Responsive Pleadings. The Coalition has petitioned the Commission to reinstate the basic 1991 restrictions on network purchase of back-end rights rejected by the Second R&O. In support of its position, the Coalition argues that the Commission correctly determined in 1991 that the networks hold sufficient market power to extract concessions and profits from program producers, and that regulatory safeguards are necessary to encourage producer entry and thereby promote source diversity. According to the Coalition, the Second R&O improperly relies on the following three grounds to reach the contrary conclusion that the networks lack such market power: (a) the market definition used in 1991 was too narrow, (b) the networks' power has further diminished since that time, and (c) the networks compete vigorously among themselves for programming. Because the Coalition views each of these grounds as flawed, it urges the Commission to reconsider the

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31 Second R&O, 8 FCC Rcd at 3340.

32 See id. at 3339-40, 3342 n.153.

resulting decision to eliminate all restrictions on network acquisition of back-end rights.

26. Similarly, the Coalition asserts that the Commission erred in the Second R&O when it concluded that finsyn restrictions impede producers from acquiring additional financing, ultimately reducing source diversity. The Coalition contends that this conclusion contradicts the Commission's 1991 determination that elimination of all financial interest constraints reduce the opportunities of producers of prime time entertainment programming because the networks will have the ability to extract rights from such producers and condition their access to network schedules, ultimately disserving the viewing public. According to the Coalition, source diversity has flourished under the protections of the finsyn rules, and the increase in network in-house productions since 1991 when the Commission eased the restraint on such productions confirms the need for continuing safeguards.

27. In view of its arguments, the Coalition states that the Commission should, at a minimum, retain a "properly structured separate negotiation safeguard," requiring the networks to refrain from any negotiations over back-end rights until after the network commits to schedule a program.[33] The Coalition puts forth its "first degree price discrimination" theory to argue that such a separations requirement would prevent network use of market power to unfairly extract concessions from program producers, and that such a schema would in fact work to defeat network exercise of undue market power. In addition, the Coalition urges the Commission to reinstate the 1991 requirement that a network certify that its acquisition of any rights in an outside production or a producer-initiated in-house production was not obtained as a condition of network licensing or airing of the program.

28. INTV also seeks to limit network acquisition of back-end rights, urging the Commission to impose a strict passivity requirement on all financial interests purchased by the networks.[34] According to INTV, a network with a financial interest in a program will gain the ability to influence or even control later syndication of the program. INTV argues that the Commission's concern that led to the insulation requirement for third-party syndicators should extend to financial interests and justifies the need for the requested passivity requirement.

29. The networks vigorously oppose any change in the Commission's decision to eliminate restraints on their acquisition of back-end rights. They argue that in the Second R&O, the Commission correctly determined that the established networks lack the ability to drive the prices of acquiring programming below competitive levels, and that the Coalition's theory that the networks have the power to engage in extraction is thus wrong. According to the networks, the Commission properly rejected its previous market definition as excessively narrow and correctly determined that, from a producer's perspective, other outlets (e.g., cable and first-run) are substitutable for

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[33] See Coalition Petition at 14-18 and 15 n.30.

[34] See INTV Petition at 6-8.

network distribution. In the more broadly defined market, the networks stress that they clearly lack the power to negatively affect the production community overall or impair source diversity. In addition to the market definition issue, the networks dispute the Coalition's two other attacks on the Commission's 1993 assessment of network market power, asserting that (a) the Commission properly measured and considered the decline in network power, and (b) the record contains ample evidence of vigorous inter-network competition. According to the networks, their declining power, as measured by audience share, along with the high level of inter-network competition, lend further support for the Commission's 1993 conclusion that they possess insufficient power to justify regulating in this area.

30. The networks also dispute the Coalition's assertion that the Commission erred in the Second R&O when it concluded that finsyn restrictions impede producers from acquiring financing, resulting in a concentration in the supply of network prime time entertainment. In response to the Coalition's point that the source diversity has flourished under the protections of the finsyn rules, the networks observe that the Coalition improperly measures diversity by the number of "executive producers" of programs, not by the number of program owners. The networks thus argue that under the proper measure, the increase in concentration of program sources is undeniable. NBC and CBS also argue that the Coalition has failed to prove that the networks favor their in-house productions or, consequently, that in-house programming threatens source diversity.[35]

31. The networks more generally argue that the Coalition has failed to rebut the FCC's findings that restrictions on network acquisition of back-end rights are harmful because they interfere with the financing opportunities of producers. As characterized by ABC, the principal restriction sought by the Coalition -- a separate negotiation safeguard -- would impair diversity by erecting an artificial barrier to network offers of back-end financing to new producers, thereby imposing "an obvious burden on what may be the producer's best source of financing."[36] Moreover, the networks dispute the underlying basis for this safeguard -- that the market is not competitive, giving the networks the power to extract non-competitive concessions from producers. Furthermore, the networks argue that this safeguard would be ineffective even if they held such power.[37]

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[35] See CBS/NBC Joint Opposition at 10. CBS and NBC also argue that their practice of not favoring in-house programming is even more remarkable given their significant incentive, under the 1991 rules, to engage in in-house production; those rules only permitted unencumbered ownership of such programming. With the Commission's decision in its Second R&O to eliminate restrictions on network acquisition of back-end rights in other types of programming, CBS and NBC contend that this incentive has been eliminated. See id. at 11.

[36] ABC Opposition at 2, 6-7.

[37] See ABC Opposition at 15-17; CBS/NBC Joint Opposition at 13-14.

32. Finally, the networks object both to the Coalition's request to reinstate a certification requirement (certifying that the network had not conditioned network access on a producer relinquishing interests in its program) and to INTV's request for a passivity requirement. CBS and NBC argue that the certification requirement is unnecessary, given the competitive state of the market, and unworkable because of the "historic ambiguity of the concept of 'extraction' in fin-syn proceedings" and the difficulty of applying "highly amorphous criteria in attempting to second-guess the results of private negotiations."[38] The networks also argue that a passivity requirement is unnecessary, in view of the requirement that networks sell their active syndication rights to an independent syndicator.

33. Decision. The Coalition's fundamental premise in contesting the Second R&O is that the host of alternative outlets to which the production community can turn to avoid a given network's purported coercion -- the 100 cable television networks; the burgeoning first-run market;[39] the new Fox network; and the other established networks with which a producer is not dealing at the time -- is insufficient to prevent each of the three established networks from extracting, on an ongoing basis, supra-competitive concessions from their suppliers of prime time entertainment programs. We rejected this assessment of the market in the Second R&O, given such factors as the breadth of alternative outlets, their programming expenditures, the significant degree of commonality between their suppliers and those of the established networks, the increasing incidence of cross-over from the established networks to these alternative outlets, and the increasing similarity in budget and quality between prime time network entertainment programs and non-network entertainment programming.[40]

34. The Coalition's response is to assert that neither cable network nor first-run syndication buyers purchase programming of a type and at a price sufficiently similar to that aired by the networks during prime time to offer a reasonable alternative outlet to producers of prime time network

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[38] CBS/NBC Joint Opposition at 14. See also ABC Opposition at 17 n.34 (arguing that a certification requirement would encourage disingenuous complaints by producers dissatisfied with the bargain they had struck and would impose an unjustified burden on networks and the Commission).

[39] This market consists of the approximately 380 independent television broadcast stations and, to a lesser extent, the major network affiliated stations, all of which purchase some degree of first-run, non-network syndicated product.

[40] See Second R&O, 8 FCC Rcd at 3304-07. The Coalition's reliance on United States v. Syufy Enterprises, 903 F.2d 659 (9th Cir. 1990), is misplaced. The market defined in that decision involved a different set of competitors, products and services, as well as a different geographic area and different market dynamic. Moreover, it is instructive to note that the Coalition relies heavily upon the Department of Justice's support of a narrow market definition in the Syufy case, but rejects the Department's view that the relevant market at issue in this proceeding is competitive.

entertainment programming. Thus, the Coalition argues that cable networks primarily offer specialized programming, news, or low-budget topical or game shows, none of which fare well in subsequent domestic or foreign syndication, and that only a small amount of programming sold in first-run consists of entertainment programs that can be syndicated after their initial run. In sum, the Coalition states that while "some producers sell a limited number of programs to cable and first-run[, this] does not mean that these outlets are reasonable substitutes for the networks."[41] Our appropriate regulatory focus, however, is not on whether producers would generally prefer to strike deals with one of the established networks, but rather whether the overall demand for programming in the broadcast and cable marketplace limits a network's ability to control the market or dictate prices for prime time entertainment programs.[42] We concluded that the marketplace does, in fact, place such limits on the networks, and the Coalition has provided insufficient evidence to call this conclusion into question.[43]

35. Moreover, the Coalition ignores or erroneously discounts several critical factors that led us to conclude that the networks lack sufficient market power to justify regulation in this area. First, the Coalition has said virtually nothing about the emergence of Fox as a viable "fourth" network. As we discussed in the Second R&O, Fox's emergence has provided program producers with a highly significant alternative outlet to ABC, CBS and NBC, and thus operates as a check on the power of these traditional networks.[44]

36. Second, the Coalition ignores the effect of the potential for competition in limiting market power. As ABC correctly stated, "the Commission took account of established trends, not merely because of their implications for the future, but because of the constraints that potential competition now imposes on the actions of networks."[45] When competition looms on the horizon, established businesses will act and plan accordingly,

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[41] Coalition Petition at 6.

[42] See Second R&O, 8 FCC Rcd at 3302-04. In the Second R&O, we acknowledged the possibility that, for some reason, the public might require a greater array of producers than a competitive market would normally bear, but in the absence of such a reason, there would be no justification for employing regulatory devices to ensure producer profits above a competitive level. We then stated that no party had provided any such reason. Id. at 3302-03. Nor has the Coalition provided one on reconsideration.

[43] Id. at 3304. Thus, we again reject the Coalition's argument that, because producers would assertedly continue to sell their products to the networks even if the networks paid them five percent less for programming, we defined the market too broadly. See Coalition Reply at 4; Coalition Opposition at 3-4.

[44] See, e.g., Second R&O, 8 FCC Rcd at 3304.

[45] ABC Opposition at 12 (emphasis in original).

recognizing that if they overreach, their potential competitors are better positioned to match or beat the terms they set. Thus, the potential for competition constrains the power of established entities. Moreover, the networks feel such constraints not only from programming outlets that may arise in the near term, but also from existing but underdeveloped outlets that the Coalition would have us ignore. In both cases, the potential for competition acts as a powerful check on a network's ability to extract supra-competitive concessions from program suppliers. Additionally, in the brief interval since the Commission adopted the Second R&O, there is increasing evidence that additional competition from new networks is more than just potential -- it is becoming a reality.[46]

37. Third, the Coalition discounts the effect that inter-network competition has in limiting network power. The Coalition argues that the structure of the negotiations process between the networks and their program suppliers, coupled with similarities of contractual terms and the like, demonstrate that the networks do not compete for programming.[47] We have, however, previously considered and rejected the Coalition's bases for this argument.[48]

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[46] See, e.g., Tyrer, "Warner TV Plan Pivots on Stations," Electronic Media, Aug. 30, 1993, at 1; Flint, "Warner Unveils a Fifth Network," Broadcasting & Cable, Aug. 30, 1993, at 6.

[47] See Coalition Petition at 8-9. The Coalition disputes the Commission's reasoning in the Second R&O that similar contractual terms are partially a function of the restrictions in the FCC's finsyn rules and the consent decrees, which limit the array of possible terms of negotiation. The Coalition states that many of the common terms have no relationship to these restrictions, and even those terms that are implicated do not mandate uniformity (e.g., to the extent the consent decrees limit the number of options a network can purchase on a program, there is theoretical, but not practical, room for negotiating a smaller number). See id. at 9. In a competitive market, however, the incidence of similar terms is not unusual. The Coalition also argues that the Commission erroneously relied on the fact that ABC and CBS have picked up some of NBC's cancelled programs as a basis for concluding that inter-network competition exists. According to the Coalition, one network's procurement of a program discarded by another does not demonstrate that the two networks ever competed for acquisition of that program. Id. at 8 n.16. In addition, the Coalition contends that "no successful series has ever changed networks in the middle of its network run." Id. (emphasis in original). We disagree with the thrust of these points. Competition clearly occurs between the networks for uncommitted producers, and to the extent the networks draw from the same pool of suppliers, their power is limited. Moreover, the recent network bidding war for David Letterman's talk show, and his resulting switch from NBC to CBS, demonstrates that the networks do, in fact, compete for programming, even during the course of a network run.

[48] See Second R&O, 8 FCC Rcd at 3307-08.

38. Fourth, the Coalition improperly discounts the significance of the networks' declining audience share when it argues that such a decline is irrelevant to the issue of the networks' market power in the program acquisition market. The Coalition contends that the networks' increasingly fragmented audience base does not justify Commission reversal of its 1991 conclusion that the networks exercise market power in the purchase of network-quality programming capable of syndication.[49] As a preliminary matter, we did not alter our view of the market simply because of the networks' declining audience. Rather, we pointed to this trend to demonstrate further erosion in network power and our resulting decreased concern that networks can abuse whatever power they might hold. Nothing the Coalition says alters this point. The broadside criticism that audience share is irrelevant to the networks' power in the program acquisition market lacks merit.[50] Viewership is the direct measure by which advertisers pay stations, which translates into profits. Program expenditures, in turn, are a critical device for increasing audience. To the extent a network loses audience, it has an incentive to increase programming expeditures, which places it in a weaker position vis-a-vis its program suppliers. At the same time, however, losses in a network's audience could impair the network's ability to pay its suppliers, which can result in the loss of the best talent to other distributers.

39. We also see no merit in the Coalition's criticism of our conclusion that the 1991 finsyn restrictions -- by preventing the free play of three additional sources of funds -- limit the overall opportunities of the production community to secure financing, thus undermining our goal of fostering source and program diversity. As we stated in the Second R&O, "any constraint on network participation in the programming acquisition process places an ostensible limit on the development of the production community, by removing a group of major financiers from the array of sources that a producer could tap."[51] The Coalition responds by claiming that the networks would unfairly extract rights from such producers rather than provide a bona fide opportunity for financing, and that the production community has done quite well without the opportunity for network financing. As we have found, however, the constraints of the marketplace will prevent the networks from

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[49] See Coalition Petition at 7-8. The Coalition also indicates that even if audience share were relevant, this share has only dropped two percentage points since 1991, thus calling into question the Commission's conclusion (according to the Coalition) that network market power has fallen sufficiently since 1991 to justify the current removal of the finsyn restrictions under discussion here. See id.

[50] It is thus not surprising that when we first adopted finsyn regulation in 1970, proponents of such regulation did not dispute the relevance of network audience share, which at that time was quite high.

[51] Second R&O, 8 FCC Rcd at 3301. We also concluded that impediments to network purchase of financial interests and syndication rights have negative effects on the smallest, least established producers, and that such producers are the first casualty of the financial interest rule. Id. at 3308.

securing undue concessions from the production community as a whole,[52] and that under the finsyn regime the production community has grown increasingly concentrated since 1970.[53]

40. In view of our conclusion that the networks lack the power to abuse their position in acquiring programming, the Coalition's request for reinstatement of a negotiations separation requirement is rejected. Moreover, such a requirement would artificially impede producers' efforts to obtain network financing, thus working against diversity goals.[54] Furthermore, we remain unconvinced by the Coalition's economic analysis (considered and rejected in the Second R&O, and repeated in the Coalition's pleadings now before us), that such a requirement could, in any event, effectively prevent

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[52] We have repeatedly cast our analysis of the networks' exercise of power in terms of whether such exercise would prevent a competitive return for the production community as a whole. As we stated in the Second R&O, we are not concerned with producer profit margins per se, and altering the distribution of profits among private parties is not, and never has been, a proper or desirable function of the Commission. Second R&O, 8 FCC Rcd at 3302. Rather, we seek to ensure that the market as a whole functions competitively, which will maximize the overall diversity of program sources and result in the best service to the public.

[53] See Second R&O, 8 FCC Rcd at 3310-11. In asserting that diversity in the production community has flourished, the Coalition repeats the same basic arguments we rejected in the Second R&O (e.g., that diversity should be calculated by counting the number of "executive producers" rather than copyright holders). While the Coalition has added nothing to justify reconsideration of this point, we note that evidence of an increase in network in-house productions since 1991 -- which the Coalition cites as an indication that lifting the finsyn constraints will reduce diversity -- is ambiguous at best, and, in any event, is largely irrelevant given the incentives (now eliminated) that the 1991 rules created for networks to increase their in-house productions. See CBS/NBC Opposition at 10-11.

[54] As ABC points out, the 1991 negotiations separation requirement, which generally prohibited networks from bargaining for back-end rights until 30 days after execution of the network license fee agreement (and, where applicable, a pilot production agreement) would impose "an obvious burden on what may be the producer's best source of financing." ABC Opposition at 6. In brief, producers have a strong disincentive to postpone efforts to secure financing, because lack of financing during negotiations over a network exhibition license will impair the producer's bargaining position, and, given the expense of creating even a pilot, a producer may not be prepared to take the risk that a network will not buy the back-end rights that would provide requisite deficit financing. Accordingly, the negotiations separation requirement would tend to drive producers to seek financing from non-network sources. We also note that the Coalition's position -- that the separation period should be lengthened -- would exacerbate these effects.

network exercise of undue market power.[55]

41. We also see no need, as requested by the Coalition, to reinstate the 1991 requirement that a network certify that it has not conditioned the relinquishment of producer rights and interests on access to the network. As CBS and NBC point out, such a certification presupposes that the program acquisition market is not competitive.[56] Since we have expressly found to the contrary, we reaffirm our elimination of that certification requirement. Moreover, we agree that there are costs associated with such a certification requirement (see supra at para. 32 and note 38); unless we are persuaded that a certification requirement is necessary to further legitimate goals, we will not, as a primary tenet of regulatory policy and law, impose requirements that may create costs.

42. Finally, we reject INTV's proposal to impose a strict passivity requirement on all financial interests purchased by the networks. The current rules are designed to ensure that the networks do not play an active role in syndicating prime time entertainment network programming. Thus, the networks are required to use an independent syndicator to syndicate any programming in which they hold syndication rights.[57] Moreover, we provided an additional safeguard when we stated in the Second R&O that we would consider complaints if a party can make a showing undermining the credibility of the "independence" of such a syndicator.[58] We also point out that if a network holds a financial interest in a program, without any accompanying syndication right, it has no legal say in the syndication of that program.[59] To the extent that a network would attempt to exercise influence or control over the syndication of such a program, we would view this as a violation of our ban on active network syndication. Accordingly, we would consider complaints regarding this behavior as well, upon a proper showing that the network had exercised such control or influence.

C. Network Syndication of Off-Network Programming and Participation in the First-Run Market

43. CBS and NBC oppose the Commission's ban on active syndication of prime time entertainment off-network and first-run non-network programming, as

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[55] See Second R&O, 8 FCC Rcd at 3309-10; see also CBS/NBC Opposition at 12-14.

[56] CBS/NBC Opposition at 14.

[57] For a description of the high degree of independence required of an "independent syndicator," see Second R&O, 8 FCC Rcd at 3317; First MO&O, 7 FCC Rcd at 373; R&O, 6 FCC Rcd at 3137.

[58] Second R&O, 8 FCC Rcd at 3317 n.87.

[59] The network is also prohibited from holding any ownership interest in the syndicator itself, due to our prohibitions against active network syndication.

well as the prohibition against network financial interests and passive syndication rights in first-run programs not produced solely in-house. Briefly, they repeat their long-held views that marketplace forces will guarantee outlet, source and programming diversity in the event all restrictions on network activities in these areas are lifted, and that the continued prohibitions harm the public interest by denying three additional competitors entry into the concentrated syndication market. INTV, the Independent Stations, the Coalition, King World, and PPDC staunchly defend the finsyn restrictions in these areas, arguing that there is ample evidence in the record to justify the Commission's concern that network entry will have an adverse effect on outlet diversity. We first address the parties' arguments regarding active network syndication of off-network programming, and then turn to the issues involved with network participation in the first-run market.

1. Off-Network Syndication

44. As explained supra at Section III-A, the record in this proceeding supports the conclusion that current market conditions alone do not justify retention of finsyn restrictions. Thus, our decision in the Second R&O to retain some measure of finsyn regulation, such as the ban on active domestic syndication by networks of their prime time entertainment programming and the prohibition against warehousing, was generally premised on three critical non-market factors: (1) the impossibility of being certain that lifting finsyn constraints would cause no harm, (2) the more significant risk of damage to outlet diversity in the event we improvidently removed the remaining restrictions, and (3) the danger that immediate elimination of all the rules would be disruptive and have unintended and unforeseen negative effects.

45. Accordingly, we adopted a cautious approach that prohibits, inter alia, active syndication by networks of prime time entertainment programming in the off-network domestic syndication area until the scheduled expiration of the rules. This approach is especially appropriate while we observe whether the concerns arising from our decision to remove restrictions on network acquisition of back-end rights will, in practice, prove unjustified. As explained above in Section III-B, we repealed the restrictions on acquisition of back-end rights because we were satisfied that such repeal would further our goals of competition and diversity. Nonetheless, recognizing the considerable dispute even in this area, along with the inherent uncertainty of predicting future events after repeal, we deemed it appropriate to observe how the networks act in the disputed areas where we have deregulated before we proceed with further deregulation. The line we drew reflects both our greater surety that repeal of financial interest restrictions in the off-network context is warranted and our conclusion that removal of the other restrictions poses a risk of greater harm if our informed predictions about network activity in the syndication (and first-run) areas are wrong. Incorrect predictions about network behavior in the latter areas would most greatly affect independent stations and undermine the important role they play in providing service to the public.

46. On reconsideration, the networks have presented no new facts or arguments that justify altering this approach. In the main, the petitions for reconsideration filed by CBS and NBC raise the same economic, marketplace and

course-of-business considerations presented in previous stages of this proceeding, which we have fully answered in the past and do not intend to reevaluate here.[60] Accordingly, the following discussion addresses petitioners' contentions only insofar as is necessary to clarify the actions of our Second R&O.

47. As a preliminary matter, we will respond to three network arguments that reflect a fundamental misreading of the Second R&O. First, NBC and CBS mistakenly contend that the Commission imposed the active syndication ban merely to eliminate the 40 percent production cap and thus remove the networks' incentive to increase their in-house productions. As the Coalition noted, "[t]he networks have it backward."[61] The Commission first determined that the most responsible approach for phasing out the finsyn regime was to lift all restrictions in one area before lifting restrictions in others. Thus, we removed all prohibitions on network acquisition of back-end rights to network programming, but circumscribed network activities in the active syndication and first-run areas. While the approach of the Second R&O is, admittedly, more restrictive with respect to active syndication than the 1991 approach, we determined that maintaining restrictions on active network syndication has significant advantages as a method for phasing out the finsyn regime.[62] Once we made this determination, we were able to remove the 40 percent limit on network prime time in-house programming; given their blanket freedom to acquire passive interests in network programming, regardless of

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[60] For example, the networks once again argue that warehousing will not work unless the networks collude and effectively control the supply of off-network and first-run programming. We have considered this argument in the past and nonetheless decided that the potential dangers of warehousing justify the cautious review process we have adopted as part of the scheduled expiration of the finsyn rules. See Second R&O, 8 FCC Rcd at 3321-22. Additionally, the networks challenge our concerns about affiliate favoritism with the following familiar contentions: (1) the networks did not engage in affiliate favoritism prior to 1970 so they will not engage in this conduct in 1993; (2) even if the networks engage in affiliate favoritism, unaffiliated stations would not be harmed because there are abundant alternatives to off-network programming; (3) network syndicators would take years to establish a presence in the market that could affect the supply of off-network programming; and (4) the networks cannot predict which programs will become hits and are therefore the most syndicable. We have heard and responded to these and other arguments that attack our underlying affiliate favoritism and warehousing concerns before. See, e.g., id. at 3315-16, 3321-24; see also R&O, 6 FCC Rcd at 3128-43. Consequently, we stand by our conclusions in the Second R&O that structural and behavioral safeguards in the off-network syndication market are advisable as a cautionary measure during this interim period when we are moving toward a more deregulated marketplace.

[61] Coalition Opposition at 3 n.9.

[62] For example, we will be able to observe how the networks behave in an unfettered program acquisition environment before altering the more critical prohibitions designed to further outlet diversity.

production arrangement, coupled with the restrictions on active syndication, the networks no longer have an incentive to inflate the amount of their in-house productions. Thus, any need for the 40 percent cap is obviated.

48. Second, NBC and CBS imply that we relied on the simplicity of the active syndication ban as an independent basis for imposing it. This is incorrect. Rather, we recognized that the new regime (including the scheduled expiration of the rules) was not only warranted for the reasons discussed herein, but it also had the advantage of simplicity and thus responded to a specific concern (i.e., that the 1991 rules were overly complex and unwieldy) voiced by the Schurz Court in its decision vacating the 1991 rules.

49. Third, the networks argue that we used the consent decrees -- and the fact that the networks are prohibited from engaging in active syndication thereunder -- as a justification for our own ban. Again, this is a misreading of the Second R&O. The purpose of our statements about the nugatory effect of modifying the 1991 rules' approach toward active syndication in light of the consent decrees was to signal that this change would not have any practical effect in disrupting any network syndication activities undertaken between 1991 and 1993, for the simple reason that the consent decrees will have barred any such activities during this period.

50. Petitioners raise a number of other arguments on reconsideration, to which we now turn. NBC, for example, challenges our decision to proceed cautiously before lifting the syndication restrictions by first waiting to observe network behavior in the program acquisition area. NBC claims that even if the networks abuse their new financial interest freedoms, it does not follow that they would engage in warehousing or other syndication abuses.[63]

51. To the contrary, we believe that what occurs in the deregulated financial interest side of the programming market will likely be relevant to our decision to phase out the remaining syndication rules. For example, if the information we gather in the future concerning network acquisition of ownership rights suggests that the networks have, contrary to our predictions, acquired the syndication rights to most attractive network programs, we might reconsider our decision to schedule repeal of the remaining rules. We also believe that evidence of network abuses in the programming acquisition market could presage anticompetitive behavior in the off-network syndication market. Finally, we believe that if the networks abuse their financial interest freedoms in the face of our deregulatory efforts, they could be found to be acting in bad faith. Such actions would weigh heavily against permitting the remaining rules to expire. Indeed, such actions could result in a tightening of our finsyn rules.

52. CBS also challenges our position on warehousing and our concerns about affiliate favoritism insofar as we have focused on the ability of the networks to "steer hit shows" toward affiliates and away from independent

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[63] NBC Petition at 6.

stations.[64] CBS claims this theory hinges on the remote possibility that in "marginal" cases (i.e., where a network affiliate and an independent station in the same market bid roughly the same amount for a syndicated program), the network syndicator would be prompted to favor its affiliate. According to CBS, this scenario is too unlikely to justify government intervention. Indeed, CBS argues that a flat ban against syndication based on such tenuous grounds violates the First Amendment.[65]

53. There is evidence in the record to raise concerns that the networks may have the ability and incentive to steer popular off-network shows toward

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[64] On a related issue, CBS challenges the idea that syndication restraints promote diversity because independent stations use revenues received from counterprogramming to subsidize local news and public affairs shows. CBS contends there is no evidence in the record to support the notion that such "cross-subsidization" occurs or that independent stations would be harmed or their range of offerings would be diminished if they could not obtain "hit" programs. CBS claims that the FCC must find that the difference between ratings obtained by new off-network hits and those of all other forms of programming is substantial enough to render other types of shows incapable of providing the same benefit. CBS Petition at 11-13.

The record clearly establishes that off-network hits draw successful ratings for independent stations during early fringe hours, which is the single greatest revenue producing period for these stations. See, e.g., INTV Comments in MM Docket No. 90-162, at 12-21 (dated June 14, 1990); Independent Stations Comments in MM Docket 90-162, at 13-14 (dated June 14, 1990). We also find support in the record for the idea that independent stations would be harmed if they could not obtain "hit" off-network shows. See, e.g., INTV Further Comments in MM Docket No. 90-162, at Exhibits 1 and 2 (dated Nov. 21, 1990). We also accept the Independent Stations' contention that because of the high cost of first-run programming and the fact that first-run shows cannot be "stripped" (i.e., stations cannot run multiple episodes a week as they can with reruns), first-run material is not a viable alternative to the ratings appeal of popular off-network hits. Contrary to CBS' refrain on the question of "cross-subsidization," we believe that by enhancing the financial well-being of independent stations, the "fringe hour" revenue stream inevitably helps to support local programming efforts. As we stated in the Second R&O, such efforts further enhance program diversity. Second R&O, 8 FCC Rcd at 3320 n.91.

[65] CBS Petition at 13-15. CBS' First Amendment challenge is not new. The network argument that our actions with respect to the financial interest and syndication rules constitute unconstitutional government regulation of speech has previously been rejected in this proceeding. See, e.g., Schurz, 982 F.2d at 1049 (acknowledging that First Amendment does not bar finsyn regulation). Also, in response to CBS' suggestion that a rule against affiliate favoritism would constitute a less restrictive alternative to a complete syndication ban, we believe the Second R&O correctly concluded that a behavioral prohibition against affiliate favoritism is not cautious enough and that structural safeguards are more appropriate during this interim period.

affiliates or otherwise give them an advantage, either by withholding from syndication programs still in the network run or by favoring affiliates during the sale of off-network programs. If the networks do in fact behave in this manner, the record indicates that independent stations would be harmed, and that such harm could undermine our diversity goals.[66] CBS suggests that the networks would generally sell their shows to the highest bidder regardless of affiliation, and that the networks would have no conceivable basis for favoring their affiliates except perhaps in the so-called "marginal" cases. While the economic theory behind CBS' analysis is well known, we continue to have doubts that the practical outcome would follow theory. Moreover, the record provides strong evidence that independent stations rely quite heavily on hit programs for their competitive viability, and that the significant harm that would flow by impeding this source of programming would damage outlet diversity.[67] Thus, in an abundance of caution, we have decided to postpone lifting the syndication restrictions until our theoretical analysis is tested by some degree of practical experience in the financial interest area.

54. CBS also presents a new theory of why the practice of affiliate favoritism does not make good economic sense and is therefore not likely to occur. According to CBS, rather than engage in affiliate favoritism, networks could directly compensate affiliates to acquire desirable syndicated programming. CBS claims that such a practice is more efficient and more likely than the networks steering syndicated programming to their affiliates and away from independent stations. The Independent Stations counter that CBS' direct compensation theory is not as simple or as practical as CBS alleges. They claim that it is extremely unlikely that networks would increase affiliate compensation without any assurances that the increased compensation would be used to purchase network syndicated programming. Also, such a transaction is inherently risky because the network has no assurance that the affiliate will be the highest bidder and secure the rights to the program. In contrast to a direct compensation scheme, INTV claims that steering a hit show to an affiliate will ensure that the network receives both syndication revenues and the advantage of a stronger affiliate base (because of the increased viewership that its affiliates will garner as a result of airing hit syndicated programs). In the case of direct compensation, however, the network suffers the cost of increasing an affiliate's compensation with no more than the hope of enabling the affiliate to acquire a particular syndicated program.[68]

55. CBS' contentions concerning direct compensation to affiliates do not eliminate our concerns about the potential dangers of affiliate favoritism. For the reasons discussed in INTV's comments, we are not persuaded by CBS' direct compensation theory. Furthermore, the fact that CBS

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[66] See, e.g., INTV Remand Reply Comments in MM Docket No. 90-162, at 3-8 and Exhibits 1 and 2 (dated Feb. 16, 1993); Independent Stations Remand Reply Comments in MM Docket No. 90-162, at 8-10 (dated Feb. 16, 1993).

[67] See supra note 64.

[68] INTV Opposition at 10-11; Independent Stations Opposition at 7-8.

has come up with a possible means for evading an affiliate favoritism safeguard does not compel elimination of our temporary ban on active syndication. Indeed, the theory of direct compensation, which could be used to evade a behavioral safeguard against affiliate favoritism, further supports the need for the ban during the interim period before expiration of the rules.

56. We also address INTV's proposal that we expand our warehousing restriction to prohibit the networks from accomplishing, through network exclusivity clauses, results similar to those that could be achieved by warehousing programs in which the networks themselves hold syndication rights. As INTV observes, such exclusivity clauses are prohibited until 1995 under the consent decrees.[69] We decline to amend our 1993 rules to include such a provision for several reasons. First, there is not even a theoretical need for such a restriction until after the prohibition contained in the consent decrees expires in 1995. Second, we believe that the occurrence of "back-door" warehousing practices like those described by INTV are speculative. Should these types of practices pose a problem in the future, we retain the right to revisit the issue.[70]

57. Finally, on our own motion, we are making a technical correction to language of the rule banning active syndication, 47 C.F.R. § 73.660(a). The first sentence of subsection (a) limits the ban to prime time entertainment network programs or first-run non-network programs, while the second sentence imposes a requirement that the networks use an independent syndicator for "any programs for which a network holds syndication rights." The independent syndicator requirement was the complement to the active syndication ban, and we intended the former to apply only to those programs covered by the ban. Accordingly, we will amend the second sentence to read: "Any such programs for which a network holds syndication rights . . . " (emphasis added).

2. Network Participation in the First-Run Market

58. As with off-network syndication, petitioners have generally failed to raise any new facts or convincing arguments that would cause us to alter our views on network acquisition and syndication of first-run programming as set forth in the Second R&O. We therefore affirm the limits that we placed on network participation in the first-run market (See supra paras. 4-5). We now turn to a discussion of contentions raised by petitioners.

59. On reconsideration, the primary challenge to our restrictions against network participation in the first-run market comes from CBS. CBS argues four points, and we note that we have considered and rejected some variation of all of these arguments in the past. First, CBS contends that

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[69] INTV Petition at 9-10.

[70] INTV furthers requests that we obtain additional certifications from the networks concerning their contractual arrangements with independent syndicators. We have previously considered and declined to adopt this identical proposal before in this proceeding. See MO&O, 7 FCC Rcd at 386-87. INTV has presented no new facts or arguments to warrant reconsideration.

regardless of the finsyn rules, independent stations will demand and obtain first-run programming capable of competing with network offerings. Second, CBS disputes the idea that networks have the ability to handicap the introduction of first-run programming through ownership of stations in major markets and through the use of their affiliate relationships. Third, CBS argues that network entry into first-run syndication will not undermine the objectives of the prime time access rule (PTAR) as the Commission has claimed. Fourth, CBS asserts that the networks do not occupy a position in the market structure that would allow them to diminish the amount of independent first-run programming aired on local TV stations.[71]

60. CBS's arguments are unpersuasive. Constraints on network participation in the first-run market are critical to the overall framework established in the Second R&O for phasing out the finsyn regime. As we have stated above, a key component of our decision to remove restraints on network acquisition of back-end rights in network programming is the fact that the burgeoning first-run market constitutes a significant alternative outlet for program producers, which supports our predictive conclusion that the networks do not have the power to coerce anticompetitive concessions from the production community once they are free to purchase such back-end rights. See supra at paras. 33-34. Because we cannot know whether this prediction is accurate until the networks begin to exercise their new-found acquisition rights, we determined that any risk of compromising the critical first-run market during the transition toward a finsyn-free environment would be imprudent. Thus, we established a framework that permits network entry into the off-network program acquisition area, but which, through the period of transition, maintains the character of the first-run market as a fully alternative outlet for program producers. While we have taken this action out of an abundance of caution, we expect that network behavior in the program acquisition area will confirm our prediction that continued restraints in the first-run area are unnecessary. Thus, we have established a sunset for these remaining constraints.

61. Moreover, we are particularly concerned that we do not jeopardize the goal of outlet diversity, which would be the case if we are wrong in predicting that network involvement in syndication of first-run product would not adversely affect the market.[72] For the reasons we took a cautious

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[71] CBS claims such a scheme would require networks to: (1) obtain control over most syndicated programs; (2) predict which shows will be popular; and (3) prevent other syndicators in the market from supplying attractive programming alternatives. According to CBS, such a scheme is as implausible in the first-run context as it is in the off-network context.

[72] Our concern over the accuracy of this prediction stems from the fact that independent stations rely heavily on first-run product. We recognized the possibility that if the networks entered the first-run market full force, they might be able to use their nationwide web of affiliates and stategically positioned owned stations to reduce the number of first-run producers. That, in turn, could enable the networks to use their ascending role as suppliers of critical first-run product to harm independent stations and ultimately reduce

approach toward active network syndication of off-network programming, we also concluded that we should proscribe network activity on the syndication side of the first-run market. Thus, we have chosen not to remove syndication restraints without first observing network behavior in the network program acquisition market.

62. CBS's challenges to the first-run restrictions do not take proper account of our reasons for proceeding cautiously in this area. For example, CBS asserts that independent station demand alone can accommodate both the influx of network-supplied first-run programming and the current levels of non-network programming. While this may prove true, we recognized the concern that network participation in the first-run market could possibly reduce the overall supply of high-quality, first-run shows, given the structure of the market. As we have discussed before, the success of a first-run program depends upon achieving clearances by (1) the most powerful stations in the top few markets and (2) a large number of markets throughout the country. We feared that the networks could use their owned and affiliated stations to launch first-run programming and shut out the programming of their competitors. In the Second R&O, we explained that

> [t]he networks can affect the purchases of [first-run] programs through their owned and operated stations that are located in major television markets, coupled with their affiliate arrangements with stations serving the vast majority of the country. Independent syndicators do not have such ability, even those that are owners of broadcast station groups. Such distributors do not always own stations in the two or three largest markets and, more significant, they lack the ongoing relationship with other stations that the networks have with their affiliates.[73]

63. While anti-competitive behavior is not the inevitable result of the networks' unique position -- a conclusion implicit in the scheduled expiration of first-run constraints -- particularly in view of the numbers of outlets available to non-network first-run syndicators and the current success of such syndicators in marketing their programming, we are not willing to take the risks until we have seen how the networks behave in the off-network program acquisition context, where the ability to control the market is less likely.

64. Moreover, until we have had some opportunity to witness network behavior in the areas we have relaxed, we remain concerned about the effect of network participation in first-run syndication on the objectives of PTAR, 47 C.F.R. § 73.658 (k).[74] PTAR was adopted to promote the development of

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the number of outlets available to viewers.

[73] Second R&O, 8 FCC Rcd at 3329. See also R&O, 6 FCC Rcd at 3144-45.

[74] CBS contends that if the Commission adheres to its rule that "network-produced first-run programming shall be considered network programming for purposes of the prime time access rule" (see R&O, 6 FCC Rcd at 3146), then there is no risk of undermining PTAR because network-produced first-run programming could not be aired during the access period (unless the

television programs by sources other than the three established networks.[75] As a result, more original programming exists today from more non-network sources than at any time prior to the adoption of PTAR. We are sensitive to concerns that allowing the networks to participate in first-run syndication may compromise the accomplishments of PTAR, especially if network syndicators affect the ability or incentive of broadcast stations to schedule independently produced programming during one of the four hours of prime time. As we have stated before, a dramatic reduction in the sources and variety of access period programs would be contrary to the public interest.

65. In conclusion, we believe CBS has ignored the unique role that top-market, network-owned stations, coupled with vast networks of affiliated stations operating primarily in the VHF band, play in determining the success or failure of first-run programs. In proceeding cautiously, we will ensure, to the extent possible, that we are correct in predicting that the networks will not, by favoring network first-run programs over non-network first-run shows, reduce the amount of independent first-run programming aired on local stations. Thus, we are mindful of the risk that independent first-run syndicators may find themselves at a disadvantage once they begin to compete against network-produced first-run programs. While we believe, however, that the network advantages alone are probably not sufficient to justify continued regulation, the need for caution warrants retention of the first-run constraints during the pendency of the transition period.

D. Reporting Requirements

66. In the Second R&O, we adopted a set of reporting requirements tailored to faciliate our review of the effects that the finsyn rule changes would have on network behavior.[76] Under these requirements, the networks must

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show falls within one of the exempted program categories). We find it curious that CBS now observes that if we allowed the networks into the first-run market but continued to define network-produced first-run programs as network programming for purposes of PTAR, the objectives of PTAR would be preserved. CBS has previously objected to including network-produced first-run programs within the prohibitions of PTAR. See CBS and NBC Petition for Reconsideration in MM Docket No. 90-162, at 16 n.39 (dated July 8, 1991). In any event, we think that CBS takes an exceedingly narrow view of PTAR, which is designed to promote alternative sources of non-network programs for both affiliates and independent stations. Even if network-produced first-run programs come within PTAR's access hour limitations, network entry into the first-run market could be damaging to the extent the networks diminish available non-network sources of programming for the prime time.

[75] See Report and Order, in Docket No. 12782, 23 FCC 2d 382, 397 (1970).

[76] 47 C.F.R. § 73.661. Pursuant to Commission order in the Second R&O, these reporting requirements were slated to become effective upon approval by the Office of Management and Budget (OMB). OMB approved the requirements on August 23, 1993, thus triggering the effectiveness of Section 73.661. See Public Notice, DA 93-1031 (released Aug. 26, 1993). Shortly thereafter, in

file semi-annual reports identifying all network prime time entertainment programs and first-run non-network programs in which they hold or acquire financial interests or syndication rights. In addition, the networks must provide various related information, such as details concerning the independent syndicators that market such programming, and lists of stations to which the networks themselves syndicate. We stated that the networks not only must file these reports with the Commission, but also must place the reports in each network owned and operated station public file before the first regular business day of September and March of each year.

67. Petitions and Responsive Pleadings. NBC and CBS have asked us to reconsider three discrete elements of these reporting requirements.[77] Specifically, these parties oppose (a) reporting on programs where the only right or interest held by the network is in foreign syndication and the program was produced solely in-house, (b) reporting on programs where the network acquired the right or interest before the effective date of the original 1970 finsyn restrictions, and (c) listing sales to foreign stations of programs that a network actively syndicates abroad. NBC argues that this type of information is irrelevant to the Commission's planned review of network behavior under the new finsyn regime, and that collection of this information would be very burdensome.

68. With respect to the first and third reporting elements listed above, NBC argues that the Commission failed to explain the relevance of information about network foreign syndication interests in and sales of "sole" productions. NBC contends that a network's involvement with this type of foreign-distributed programming has no effect on outlet diversity in the United States and implicates none of the potential financial interest or syndication behavioral abuses the Commission intends to monitor. According to NBC, these requirements "impose on the networks a burden of preparing long lists of programs and foreign customers that will not give the Commission any information that is relevant or useful to its future deliberations."[78] NBC also objects to the third reporting element (requiring lists of foreign stations to which a network syndicates) on the ground that "a network's foreign customer lists are proprietary information, and should not be

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response to a request by NBC, the Commission adopted an Order, FCC 93-427 (released Aug. 27, 1993), temporarily suspending network obligations to comply with the three discrete aspects of the reporting requirements that the networks have opposed on reconsideration. See infra para. 67.

[77] NBC has taken the lead in arguing that the reporting requirements should be modified. CBS has joined in NBC's objections. While ABC did not comment explicitly on the reporting issues in the reconsideration stage of this proceeding, ABC has filed a statement in support of NBC's request for delay in compliance with the reporting requirements, voicing strong agreement with NBC's position on the burdens of the elements of the reporting requirements to which NBC objects, as well as NBC's position that those burdens are not justified.

[78] NBC Petition at 8.

disclosed to its competitors absent some compelling regulatory rationale."[79]

69. With respect to the second reporting element -- programming acquired before the 1970 finsyn rules became effective -- NBC argues that in adopting the 1970 rules, the Commission had fully explored network activities and behavior regarding such programming, and that there is no reason to reexamine 25 year old transactions and records now, in a completely different context and against a completely different competitive setting.[80] Moreover, NBC stresses the burden of reporting on these old transactions: dozens of programs are involved; some of them were produced decades ago; records may be difficult to reconstruct or may not be available at all.

70. The networks' objections to these three discrete elements of the reporting requirements provoked little reaction. INTV, however, contests the networks' opposition to reporting information about pre-1970 programming activities. According to INTV, "learning the manner and extent of syndication of such hit network programs would contribute considerable insight into the operation of an unregulated syndication market."[81] While INTV acknowledges that the networks may encounter some practical difficulties in providing pre-1970 information, and that network incentives to disadvantage competing independents are greater today than in 1970, INTV contends that network behavior occurring 25 years ago would nevertheless "provide the sort of detailed evidence not proffered by the networks in this proceeding."[82]

71. Decision. Upon reconsideration, we have determined that the reporting requirements should be modified in certain regards, but not to the extent requested by the networks. With respect to the first element challenged by the networks (programming produced solely in-house and syndicated exclusively abroad), we have decided to make no changes. While NBC contends that it would have to prepare "long lists of programs" to satisfy this requirement, it has not quantified the burden with any degree of detail or argued that such lists, despite their purported length, could not easily be generated. Accordingly, the networks have failed to make an adequate showing that the asserted burden justifies modification of the requirement. Moreover, we continue to believe that such information would be relevant for our scheduled review of network behavior under the current finsyn regime. Information on network in-house productions distributed solely abroad will help provide a more complete picture of the scope of network in-house production activities, which will enable us to place in perspective increased network activity in the program production and acquisition market once the networks are free to purchase back-end rights in off-network programming. In

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79 Id.

80 See NBC Petition at 9; see also CBS Reply at 6 n.20 (contending that Commission is "seeking to assemble evidence to justify rules that have been in place since 1970").

81 INTV Opposition at 4.

82 Id.

addition, throughout the review period prior to the expiration of the rules, it is imperative that the Commission attain thorough information that would reveal any potential for abuse in a finsyn-free environment. The networks' distribution and syndication behavior abroad may have an indirect unanticipated effect on the domestic production and distribution market. Thus, we must obtain sufficient information to conduct a complete assessment of network activity, both domestically and overseas.

72. We are, however, sensitive to the networks' concern that the reporting requirements may force them to disclose sensitive proprietary information. The third element of the reporting requirements opposed by the networks (lists of sales to foreign stations of programs that they actively syndicate abroad) may have the unintended result of forcing disclosure of sensitive business information; disclosure of customer lists may reveal business strategies and expose competitive vulnerabilities. Accordingly, we will modify the rules to clarify that the networks need not provide proprietary or confidential customer lists of foreign stations, but may either redact the identity of the stations (if contracts are provided as part of the reports) or report the market (city and country) to which a specific program is syndicated. As indicated above, however, we are unconvinced that this requirement either places a significant burden on the networks during the eighteen-month review period or is irrelevant to our review.

73. We see no reason to make any major change to the remaining element of the reporting requirements challenged by the networks (programs acquired before the effective date of the 1970 rules). One of the goals of our scheduled review of the finsyn rules is to assess the scope of the networks' program ownership under the relaxed regime. Since programming purchased by a network before the 1970 rules became effective and retained to date constitutes a portion of the network's current holdings, we could not form an accurate picture of those holdings without the specific information that this particular reporting requirement is designed to place on the record. Moreover, information about pre-1970 acquisitions will provide data on specific interests that the networks obtained before regulation, which will establish a baseline against which to compare network transactions in the post-deregulation period. Significantly parallel transactions from the pre-1970 and post-deregulation periods could be probative during the Commission's review of the remaining finsyn regulations. Thus, we will continue to require that the networks provide this information. While the networks have failed to demonstrate that they would encounter any significant burden in doing so, we observe that one aspect of the rule could be difficult or impossible to satisfy for pre-1970 programs: the Section 73.661(a) obligation to identify the party who initiated negotiations that led to network acquisition of finsyn rights. Accordingly, we will eliminate the obligation to provide this information for programs acquired by a network before the effective date of the 1970 finsyn rules.[83]

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[83] The relevant prohibitions under the 1970 finsyn rules became fully effective after August 1, 1972. See Memorandum Opinion and Order Setting Effective Dates in Docket No. 12782, 35 FCC 2d 411 (1972). Accordingly, we have cast the limiting language of the revised reporting rule in terms of

E. Exemption for Emerging Networks

74. Background. In the Second R&O, the Commission decided to exempt "emerging networks" from most of the remaining finsyn regulations.[84] We recognized that without such an exemption, entities on the threshold of becoming "networks," such as Fox, would be discouraged from programming to capacity, thereby depriving independent stations of access to quality first-run programming important to their ability to compete.[85] In Fox's case, we were persuaded by its claim that it would not provide programming in excess of any limit that would require divestiture of its television production and syndication businesses. We observed that such unintended consequences were contrary to the objectives of the finsyn rules.[86] Moreover, we observed that subjecting Fox to finsyn restrictions once its prime time offerings pass 15 hours, only to have the restrictions expire after the provisions in the network consent decrees are lifted, would serve no useful purpose and would likely only discourage Fox from expanding its prime time offerings to capacity.[87] In sum, the Commission stated that adoption of this exemption would remove a significant impediment to the development of competition with the established networks, and would precipitate an increase in the amount of programming available to broadcast stations not affiliated with these established networks.[88] Moreover, we observed that the exemption would preserve a degree of competitive equilibrium in the video marketplace as we proceeded through the phased transition toward elimination of all finsyn restrictions.[89]

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programs acquired on or before August 1, 1972. See Appendix A herein (Section 73.661(a)).

[84] See Second R&O, 8 FCC Rcd at 3331. An "emerging network" is defined as an entity not meeting the definition of "television network" as of June 5, 1993, but which subsequently meets this definition. 47 C.F.R. § 73.662(g); see also 47 C.F.R. § 73.662(f) (in general, defining "television network" as any entity providing on a regular basis more than fifteen hours of prime time programming per week to interconnected affiliates that reach, in aggregate, at least seventy-five percent of television households nationwide). As stated above, the emerging network exemption is not complete. Thus, an emerging network must comply with the reporting requirements of Section 73.661 once it provides 16 hours or more of prime time programming to interconnected affiliates. See 47 C.F.R. § 73.661(e).

[85] Second R&O, 8 FCC Rcd at 3333.

[86] Id.

[87] Id.

[88] See id. at 3331.

[89] Id.

75. Petitions and Responsive Pleadings. CBS and NBC oppose any exemption for emerging networks. Terming the exemption as essentially one for the Fox network (a company on the threshold of qualifying as a "television network" under the finsyn rules), these parties argue that Fox is not materially different than the three established networks, and that by favoring Fox, the rules are unconstitutional, arbitrary and capricious, and therefore unlawful.[90] In support of their position, CBS and NBC observe that, like the established networks, Fox owns and operates broadcast stations in major television markets, has a group of affiliated stations serving the vast majority of the country, and stands on a competitive par with the established networks in terms of profitability, ratings, hours of service and programming expenditures. Moreover, CBS and NBC point out that Fox (unlike the established networks) operates a robust syndication business. NBC adds that Fox's parent also operates a vertically integrated movie studio.

76. In view of the above, CBS argues that the exemption is inherently suspect under the First Amendment because it favors a certain class of speaker over others, and that the FCC must meet a "heavy burden" to justify its favorable regulatory treatment of Fox.[91] According to CBS, the only FCC-cited justification for the exemption, however, stems from Fox's own decision to refrain from expanding its prime time programming hours. Since, as stated by CBS, Fox's shorter hours have not hindered that company's development as a vibrant competitor, Fox's voluntary business decision to avoid the strictures of the finsyn rules cannot justify discriminatory treatment of the other networks. Moreover, CBS argues that the FCC has violated its statutory duty to engage in rational decision-making by treating similarly situated parties in dissimilar ways.

77. Fox, Fox Affiliates and INTV strongly defend the exemption, arguing that there are material differences between Fox and the established networks that justify the dissimilar treatment and render the exemption lawful and appropriate. The differences cited by the supporters of the exemption fall into three principal categories. First, they argue that there are significant structural differences between Fox and and the major networks, because the Fox network has many fewer affiliates and its distribution system is primarily UHF-based. In contrast, the major networks' stations (both owned stations and affiliates) operate primarily in the VHF band, giving them a decided technological edge. Second, supporters of the exemption argue that there are significant differences in terms of profitability. Third, the supporters of the exemption argue that there are significant programming differences; in contrast to the major networks, Fox provides fewer programming hours to its

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[90] See, e.g., CBS Petition at 20-23 (arguing that the exemption violates the First Amendment and the APA); NBC Petition at 11 (characterizing the exemption as "unfair, discriminatory and Constitutionally suspect").

[91] See CBS Petition at 22. CBS also cites several cases that invoke the Equal Protection Clause of the Fourteenth Amendment. See id. at 22 n.89 (citing, for example, News America Publishing, Inc. v. FCC, 844 F.2d 800, 804 (D.C. Cir. 1988), and its holding that the Equal Protection Clause requires the government to afford similar treatment to similarly situated persons).

affiliates both in prime time and in other dayparts, and it receives much poorer ratings.

78. According to Fox, the established networks' objections to the exemption appear to be derived from "fairness" concerns under an equal protection theory. Fox argues, however, that equal protection principles are not violated and do not compel uniform regulatory treatment where differently situated entities are treated differently. Moreover, Fox adds that even if the FCC thought that emerging networks were structurally and operationally similar to established networks, the exemption would pass constitutional muster because it is carefully targeted to achieve a substantial government interest -- i.e., to advance the diversity objectives underlying the rules by promoting competition, lowering barriers to entry into the broadcast network market, and enhancing diverse programming options for independent stations.[92]

79. Fox also disputes CBS's assertion that the Commission justified the exemption based solely on Fox's own decision to refrain from expanding its prime time programming hours. According to Fox, the FCC's careful review of the record concluded that Fox's emergence enhanced source diversity (by providing a wealth of programming) and bolstered outlet diversity (by providing a solid financial base to Fox affiliates, many of which had been marginal independent UHF stations).[93] Moreover, Fox argues that CBS's characterization of Fox's decision not to expand its programming hours as voluntary is specious, given the business realities. Fox states that it would be irrational from a business standpoint to divest its syndication activities in order to program more prime time hours, even if the rules were of indefinite duration. Given the short projected life of the remaining finsyn restraints, Fox claims that it would be suicidal to divest and counterproductive from a public interest perspective. Thus, Fox reasons that if the Commission removes the exemption, viewers, independent stations (mostly UHF), producers, and advertisers would be deprived of the benefits of expanded competition that the exemption will foster.[94]

80. Finally, the Independent Stations lodge a partial objection to the exemption. Contending that Fox should not be allowed to warehouse programming or engage in affiliate favoritism, they urge the Commission not to exempt emerging networks from Section 73.660(b) of the Rules (the warehousing restriction) and to impose on them a behavioral prohibition against affiliate favoritism, or at a minimum state that warehousing and favoritism are against

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[92] See Fox Opposition at 8-9.

[93] See Fox Opposition at 11-12.

[94] See Fox Opposition at 10-11; see also INTV Opposition at 22 (arguing that the exemption preserves an enormous benefit by not forcing Fox to choose between its network and syndication business, citing Fox's help to independent stations and the resulting enhancement to outlet diversity); Fox Affiliates Opposition at 4-6 (citing Fox achievements and arguing that Fox's promise will remain unfulfilled if it is effectively required to reduce its prime time programming).

Commission policy.[95] Fox opposes these measures, arguing that the rules already prohibit such behavior, that the reporting requirements will enable the Commission to monitor for abuses, and that the Commission stated in the Second R&O that it would entertain complaints regarding such behavior upon a showing of misconduct.[96] In reply, the Independent Stations contend that the FCC will be unable to monitor Fox's behavior until that network provides 16 hours of prime time programming per week, and that monitoring is no substitute for a substantive prohibition.[97] The Independent Stations explain that without an affirmative prohibition, the FCC cannot correct abuses without conducting another rulemaking proceeding to modify the exemption, which is a more difficult and less straightforward approach toward resolving such problems. In addition, the Independent Stations argue that the Commission's statements in the Second R&O about entertaining complaints only related to possible abuse by the established networks in their dealings with independent syndicators.[98]

81. Decision. The networks' objections to the exemption for emerging networks stem from their contention that they do not differ in any material regard from Fox (and presumably any other entity that approaches the network definitional threshold). We disagree. Fox operates its network on a decidedly different level than the major networks, due in large part to the fact that its distribution system is primarily UHF-based and it competes against three firmly entrenched, decades-old competitors.[99]

82. Consequently, network revenues for Fox pale in comparison to those of the established networks. Thus, from 1988 to 1991, Fox's share of broadcast network revenues range between one and five percent, with the three established networks splitting the difference.[100] For 1992, Fox estimated its

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[95] Independent Stations Petition at 14-15.

[96] Fox Opposition at 13-14.

[97] Independent Stations Reply at 4-5.

[98] Id. at 6-7.

[99] Fox has presented a cogent set of facts that demonstrates these differences. With respect to the technical aspects of its distribution system, Fox offers the following data: Four of Fox's eight owned stations are UHF, while only one of twenty-four stations owned collectively by the major networks is UHF; Fox has 140 affiliates, while ABC and NBC have 196 each, and CBS has 192; Fox only has 19 VHF affiliates, while ABC has 135, NBC has 146 and CBS has 159; 121 of Fox's affiliates (86%) are UHF, while CBS has only 33 UHF affiliates (17%), NBC has 50 (25%) and ABC has 61 (31%); Fox serves 84% of the top 50 and top 100 markets with UHF affiliates, while corresponding numbers for the networks are 12% and 26% for ABC, 10% and 15% for CBS, and 12% and 21% for NBC. See Fox Opposition at 4-5.

[100] Fox Opposition at 5.

revenues at six percent.[101] With respect to performance, we find Fox's factual showings much more compelling than that of the established networks. While Fox has achieved remarkable success in a number of isolated instances, overall the amount of programming it provides to its affiliates, and its ratings and related performance measures, differ significantly from that for ABC, CBS and NBC.[102] In sum, we agree with the following assessment put forth by Fox:

> [T]he specific details of Fox's competitive posture demonstrate that Fox has yet to overcome the established networks' pronounced competitive advantages as mature entities with mature, technically superior affiliates -- not just in prime time, but in all dayparts and in virtually every aspect of network operations. Moreover, periodic fluctuations in ratings or audience delivery cannot compensate for the immutable inherent weakness of Fox's distribution system. There is no more basis in fact today than there was in 1990 for the networks' claim that Fox 'is a fully developed competitor of ABC, CBS and NBC.'[103]

83. Despite Fox's above-described disadvantages vis-a-vis the established networks, we have nevertheless recognized that Fox is a significant competitive force and substantially contributes to the diversity of the marketplace on every level. Thus, we have cited Fox's emergence in the marketplace as a significant factor in relaxing the finsyn regime and scheduling the elimination of the rules. Accordingly, while it is clear that the established networks operate at a distinct advantage compared to Fox, the critical question is whether this fact justifies different regulatory treatment. On the one hand, as CBS notes, the above-described differences between Fox and the established networks do not necessarily mean that Fox lacks the incentive to favor its affiliates or engage in warehousing.[104] On

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101 Id.

102 The record indicates that Fox averages 15 hours of prime time programming, with a maximum of 36 total hours of programming per week. Each of three established networks program 22 prime time hours per week, with total hours of programming per week of 91.5 for ABC, 102 for NBC, and 104.5 for CBS. Fox Opposition at 6. Fox provides only 21 percent of its affiliates' total weekly programming in all dayparts. In contrast, ABC provides 54%, CBS provides 62%, and NBC provides 61%. Id. For the 30 weeks between September 1992 to April 1993, Fox was never the number one ranked network (by HH rating). Fox was the fourth-ranked network for 28 of the 30 weeks. Id. at 7. For the period September 1992 to July 1993, Fox's average prime time rating/share was 5.3/9. The average prime time ratings/share of the three major networks during this same period were 11.9/20 for ABC, 12.5/21 for CBS, and 10.8/18 for NBC. Id. For the period September 1992 to July 1993, Fox's average program ranking was 107, compared to 27 for CBS, 34 for ABC and 44 for NBC. Id.

103 Fox Opposition at 8, quoting CBS Petition at 22.

104 See CBS Reply at 8 n.24.

the other hand, the above-described differences between Fox and the established networks are certainly not negligible. In fact, those differences, coupled with the critical role that the exemption plays in our conclusions about the dynamics of the marketplace and how the finsyn rules can be safely eliminated, lead inexorably to the conclusion that the distinction we have drawn between the established and emerging networks is not only rationally based, but integral to our substantial governmental interest in fostering diversity and competition.

84. As we explained in our discussion of the framework for review and expiration of the remaining rules, we have temporarily retained certain finsyn restrictions on the established networks in large part to ensure that our conclusions about the marketplace are correct, to avoid significant harm to the market's diversity and competitive structure in the event we have misjudged its dynamics, and to make a smooth transition toward a non-finsyn regime. Encouraging the continued growth of entities like Fox -- which is the function of the exemption -- clearly solidifies the bases for our marketplace conclusions. In contrast, regulation that discourages emerging competition undermines our conclusion that the market could function competitively and will increase in diversity if we were to remove all finsyn constraints. Thus, removing the exemption would alter the framework of our analysis that led us to conclude that the finsyn rules should be phased out. Moreover, the exemption will allow us to see how an entity that approaches the functioning of the established networks operates in the syndication market. In addition, the fact that Fox operates at a lower plane and did not participate in the market behaviors that led to the finsyn rules, makes us more confident that no abuses will occur. Furthermore, as we observed above, it would serve no useful purpose to subject Fox and other emerging networks to finsyn rules that are slated to expire shortly. In contrast, maintaining certain finsyn rules under which the established networks operate serves a substantial governmental interest -- ensuring an orderly transition toward a non-finsyn regime so that we preserve a competitive equilibrium in the marketplace, avoid unintended and unforseen negative effects and thus safeguard diversity and competition.

85. The Independent Stations' proposals to impose warehousing constraints and anti-affiliate favoritism measures on emerging networks would create an unnecessary layer of regulation on such networks' operations, and, therefore, we decline to adopt such safeguards. As we have indicated, our view of the market is that such networks could not create any damage to the public interest even if they were to engage in such practices, and we are certain enough of this view to implement it at the current time, given the overall framework we have established for phasing out the finsyn rules.

86. Finally, we reject the established networks' constitutional challenges, as well as their arguments that our creation of an exemption was

arbitrary or capricious.[105] As we have shown, we have exempted emerging networks for compelling reasons, and we have rationally drawn the line between those networks and the three established ones based on their inherent differences -- differences not only in terms of structure, profitability and performance, but also in terms of their position and role in the market and in our framework for phasing out the rules.

IV. Administrative Matters

A. Regulatory Flexibility Act

87. Pursuant to the Regulatory Flexibility Act of 1980, the Commssion included a final analysis in the Second R&O detailing (i) the need for and purpose of the rules, (ii) the summary of issues raised by public comment in response to the initial regulatory flexibility analysis, Commission assessment, and changes made as a result, and (iii) significant alternatives considered and rejected. No substantive changes have occurred pertaining to the final analysis as a result of the petitions for reconsideration.

B. Ordering Clauses

88. Accordingly, **IT IS ORDERED** that the petitions for reconsideration filed by the Association of Independent Television Stations, Inc., CBS Inc., Chris-Craft/Tribune et al., the Coalition to Preserve the Financial Interest and Syndication Rule, and National Broadcasting Company, Inc., **ARE GRANTED** to the extent indicated herein and are otherwise **DENIED**.

89. **IT IS FURTHER ORDERED** that pursuant to authority contained in Sections 4(i), 301, 303(b), (f), (g), (i), and (j), 307(d), 308(b), 309(a), 310, 312, 313 and 314 of the Communications Act of 1934, as amended, Part 73 of the Commission's Rules **IS AMENDED** as set forth in the attached Appendix A.

90. **IT IS FURTHER ORDERED** that the amendments to 47 C.F.R. Part 73 adopted in this Memorandum Opinion and Order shall go into effect 30 days after publication in the Federal Register, except for the amendments to Section 73.661, which shall go into effect 30 days after publication in the Federal Register or upon approval by the Office of Management and Budget, whichever is later.

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[105] Finsyn rules applicable to the three established networks have been held not to violate the First Amendment. See, e.g., Schurz, 982 F.2d at 1049; Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971). Moreover, given the fact that the exemption is, at minimum, a rationally drawn classification, objections based on equal protection grounds are without merit. See, e.g., FCC v. Beach Communications, Inc., 113 S.Ct. 2096 (1993).

91. Further information on this proceeding may be obtained by contacting David E. Horowitz or Kathleen O'Brien Ham, Mass Media Bureau, at (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

Part 73 of Title 47 of the Code of Federal Regulations is amended to read as follows:

Part 73 Radio Broadcast Services

1. The authority citation for Part 73 continues to read as follows:

AUTHORITY: 47 U.S.C. Sections 154, 303, 334

2. Section 73.660 is amended by revising paragraph (a) to read as follows:

§ 73.660 Television network participation in program syndication.

(a) No television network, other than an "emerging network" as defined in Section 73.662(g), may actively syndicate any prime time entertainment or first-run non-network program to television stations within the United States. Any such programs for which a network holds syndication rights shall be syndicated domestically through an independent sydicator.

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3. Section 73.661 is amended by revising paragraph (a) and the first sentence of paragraph (b) to read as follows:

§ 73.661 Network television program ownership and syndication reports.

(a) A television network shall maintain reports identifying all network prime time entertainment programs, whether aired on its own or another network, and all first-run non-network programs, in which the network holds or acquires financial interests or syndication rights. The network shall identify the name of the program, the type of program (network or first-run), the nature of the interest or right held in the program, the dates the program (if a network program) began and ended its network run, and the date the program (if a first-run program) first appeared in syndication. Where a network has, before June 5, 1993, but not on or before August 1, 1972, acquired an interest or right in a program presented to the public, the network shall identify the party that initiated negotiations that led to network acquisition of such interest or right. Any contract or agreement creating or conveying a financial interest or syndication right shall be made available to the Commission upon request.

(b) For any television network that actively syndicates any prime time entertainment program or any first-run non-network program, the network shall maintain reports that list the sales to broadcast stations of any

such programming it actively syndicates; provided, however, that with respect to sales of programs to broadcast stations outside the United States, the network may either redact the identity of such stations (if contracts are provided as part of the reports) or report the market (city and country) to which a specific program is syndicated rather than the identity of the station. * * *

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4. Section 73.663 is redesignated as Section 73.664, and a new Section 73.663 is added to read as follows:

§ 73.663 Expiration of the financial interest and syndication rules.

The Commission shall initiate a proceeding to review network activities in the financial interest and syndication areas no later than eighteen months after the entry of an Order by the United States District Court, Central District of California ("District Court") in Civ. Nos. 74-3599-R, 74-3600-R and 74-3601-R, lifting restrictions of the consent decrees administered therein that overlap the restrictions of 47 C.F.R. Sections 73.659, 73.660 and 73.661. In the Commission's review proceeding, the Commission shall presume that expiration of said Sections is warranted, and the burden of proof shall be placed on those who oppose the expiration. Unless the Commission takes affirmative action to the contrary, said Sections shall expire two years after the entry of the aforementioned Order by the District Court.

Separate Statement of Chairman James H. Quello, dissenting in part.

Memorandum Opinion and Order, In the Matter of Evaluation of the Syndication and Financial Interest Rules, MM Docket No. 90-162.

In my initial dissent to the Commission's finsyn decision I wrote, "If the Commission in 1991 set out to adopt finsyn rules for the first time, I find it inconceivable that anyone would consider doing so." *Evaluation of the Syndication and Financial Interest Rules*, 6 FCC Rcd. 3094, 3247 (Dissenting Statement of Commissioner Quello). I feel somewhat vindicated in this statement by the Commission's decision in our proceeding on cable television ownership limits, also decided today, to reject finsyn-type restrictions for cable television operators. *Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992*, MM Docket No. 92-264 (adopted September 23, 1993).

This suggests to me that the types of rules the Commission adopted for the established networks nearly a quarter century ago have no place in today's diverse and dynamic media marketplace. In this regard, I think today's decision to reaffirm the Commission's April 1 *Second Report and Order* is correct. Although I have some reservations about the continuing restrictions, I said at the time that the decision was "a testament to a spirit of compromise." I still believe this to be true.

In other words, I agree with almost all of today's decision. However, I found some of the arguments for reconsideration to be persuasive that, unfortunately, were not incorporated into this decision. It is in this very limited respect that I dissent.

Some petitioners suggested that the two-year sunset period was arbitrary in that it does not allow the Commission to adequately consider market conditions. I disagree with this argument to the extent some suggest that our procedure will cause premature repeal of the remaining rules. If, after the scheduled review, the Commission believes that some rules should be retained, it certainly may vote to do so.

On the other hand, if the world of mass media is transformed before the scheduled time for review, the Commission should openly acknowledge that fact and stand ready to accelerate the process. Consider the real or potential changes that have occurred in the six short months since we adopted the *Second Report & Order*:

— A U.S. District Court in Virginia struck down as unconstitutional the cable-telco cross-ownership rule,[1] clearing the way for Bell Atlantic (and potentially other telephone companies) to get involved in program production;

— News stories have persisted that Time-Warner and/or other major industry players are poised to launch a fifth broadcast network;

— Viacom and Paramount announced their intention to merge, a proposed deal that attracted a competing bid from the QVC home shopping cable network;

— Five TV station groups have combined forces to produce first run syndicated programming to provide themselves with an alternative to existing programming sources.

In the even more brief time between the Commission vote in this proceeding and the release of this text, Bell Atlantic and TCI, the nation's largest cable television operator, announced their intention to merge. If it is consummated, this transaction would be the largest merger in U.S. history — twice the size of the Time-Warner merger — and it would combine telecommunications, cable and programming businesses on a scale unimaginable when the Commission began reconsidering finsyn.

Given such significant developments, we may not even recognize the media landscape in a matter of months — not years. Obviously, this would have profound implications for the continuing validity of any finsyn rules.

In its bid to merge with Paramount, Viacom has been joined by both NYNEX and Blockbuster Video. This possible combination would create a single entity that is involved in motion picture production and distribution, cable channel networking, cable system ownership, television programming, publishing, broadcasting, telecommunications, video rentals, and interactive

multimedia products. With regard to broadcasting alone, the merged company would own 12 television stations, would produce over 30 hours of new television programming weekly and would control what Viacom describes as "an enormous syndication library."

The proposed merger of Bell Atlantic and TCI dwarfs the prospective Viacom-Paramount deal. It could fundamentally alter the communications landscape and no doubt will trigger other similar alliances. *See, e.g.*, Foisie, *Handicapping Telco-Cable Partnerships*, BROADCASTING & CABLE, October 11, 1993 at 37.

In short, we are entering an era in which programming and other software producers are combining with firms engaged in various forms of distribution. The only entities excluded from this trend are the companies that have been most responsible for providing free over-the-air broadcasting to the American public — the established television networks. This makes less sense with each passing day.

Even if the Commission were to limit its review to changes in the broadcast sector, it appears that competition is developing even more rapidly than anticipated. Press accounts strongly suggest that major studios are racing to create a fifth network. *See, e.g.*, Flint, *Warner Unveils a Fifth Network*, BROADCASTING & CABLE, August 30, 1993 at 6; Tyrer, *Warner TV Plan Pivots on Stations*, ELECTRONIC MEDIA, August 30, 1993 at 1; Flint, *Who Will Be the First With a Fifth Network?*, BROADCASTING & CABLE, October 18, 1993 at 18. If this develops, the additional competition would further reduce any remaining rationale to constrain the established networks.

Moreover, independent stations would need less protection because most would likely qualify for affiliation with the new network. *E.g.*, *Suppliers See Market Shifts*, BROADCASTING & CABLE, August 30, 1993 at 14. As the head of Warner Brothers Television said in a recent interview:

> We are very excited about the fifth network. We are program suppliers, and that's what my operation is about. We are the number one supplier at three of the four networks right now. Hopefully, we'll be the number one supplier at four out of the five. . . . What's been happening right now is the lining up of the various station groups. And I don't think it will fragment it any more because all the stations will be doing is unifying station groups that are already out there.2

For independent stations that do not affiliate with new networks, protectionist policies will be less necessary as station groups join to produce first run programming. *See* Benson, *Stations Buck System*, DAILY VARIETY, September 1, 1993 at 1 ("In an unprecedented effort to break the grip of the major studios and networks over production and distribution, five TV station groups are teaming to produce their own fare . . . .").

Of course, the Commission cannot make policy based on prospective press reports, and none of these arrangements may come to pass. Then again, they may all bear fruit. The point is, even a casual observer of the media landscape must be aware that we are in a time of great change.

A wise man once described as "regulation by robot" an administrative decision to decide a matter in advance and not to deviate from that time line, regardless of the facts. My question is this: What could be more robotic than to put off any further review for two years if the critical assumptions underlying the rules vanish long before the designated time?

I would have added a provision to expressly invite interested parties to seek expedited review of the remaining rules if warranted by further market changes. With such a procedure, the Commission would have been in a position to examine the facts to see if petitioners could make the case for earlier review. However, I could not persuade a majority to include such a provision.

Additionally, I would have further streamlined some of the reporting conditions imposed on the networks. Upon further reflection, I can think of no reason why the FCC should require the networks to dig through decades worth of old records to report on program interests acquired before 1970. I cannot imagine how this information will assist the Commission in its further review of the rules. This agency compiled an exhaustive record on the pre-1970 programming practices of the networks when it adopted the finsyn rules. That record will be more than sufficient when the time comes for further review.

Similarly, I would dispense with reporting requirements on network in-house productions that are syndicated only in foreign markets. We should be more cautious about creating unnecessary administrative burdens — both inside and outside the Commission — if the information we seek is not relevant to our future proceedings.

In the larger scheme of things, my concerns about this decision are relatively minor. Taken as a whole, it represents substantial deregulation, and promises to complete the process within a reasonably foreseeable time. Better a bit late than never.

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[1] *The Chesapeake and Potomac Telephone Company of Virginia v. United States*, Civil No. 92-1751-A (E.D. VA August 24, 1993).

[2] *Warner TV's Leslie Moonves and Television in the Fast Lane*, BROADCASTING & CABLE, October 11, 1993 at 19, 24.

SEPARATE STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

Re: In the Matter of Evaluation of the Financial Interest and Syndication Rules (MM Docket No. 90-162)

In this Financial Interest and Syndication proceeding, the Commission addresses several issues raised in petitions for reconsideration of the Second Report and Order[1]. The challenges which have been made to aspects of the rule, include but are not limited to, the adoption of an interim transition approach for removing financial syndication interest rules ("finsyn") and to certain reporting requirements that are currently imposed on the networks. I write separately to emphasize the importance of the sunset approach to phasing out finsyn.

In 1991, I made a commitment to support the existence of finsyn restrictions until the record reflected that the video market offered a greater number of competitive outlets with comparative reach.[2] In 1993, upon the Commission's issuance of the Second Report and Order, while recognizing that the programming market is continually changing in response to technological and economic factors, I cautioned that the public interest would not be served unless the Commission bore its responsibility -- to preserve broadcast outlet diversity through access to diverse syndicated program success.[3]

The sunset provision of the rules and the resulting review period provide an interim and orderly transition into a deregulated arena from an environment that was closely monitored until just two (2) years ago.

It is out of an abundance of caution about the resulting impact of finsyn's elimination that I support the finsyn sunset provision. By reviewing the effect of the more relaxed finsyn

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[1] Financial Interest and Syndication Rules, Second Report and Order in MM Docket No. 90-162, 8 FCC Rcd 3282 (1993).

[2] See, Statement of Commissioner Andrew C. Barrett re: In the Matter of Evaluation of the Syndication and Financial Interest Rules, MM Docket No. 90-162 dated April 9, 1991.

[3] See, Statement of Commissioner Andrew C. Barrett re: Financial Interest and Syndication Rules, Second Report and Order dated April 1, 1993.

constraints on the syndication market, we will not overlook our primary jurisdictional concern -- the continued diversity in independent television outlets. Therefore, I am comforted knowing that a safeguard mechanism has been put into place for ensuring that the public interest is served through access to diverse programming.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

FCC 93-479

In the Matter of	)	
	)	
Amendment of the Commission's Rules To	)	PR Docket No. 93-35
Provide Channel Exclusivity To Qualified	)	RM-7986
Private Paging Systems At 929-930 MHz	)	

REPORT AND ORDER

Adopted: October 21, 1993 **Released:** November 17, 1993

By the Commission: Commissioner Barrett issuing a separate statement.

I. INTRODUCTION

1. In this Report and Order, we amend our rules governing private paging service in the 929-930 MHz band to grant channel exclusivity to qualified local, regional, and national paging systems. Private paging systems consisting of six or more transmitters will be entitled to exclusivity in most markets, and larger systems will be eligible for regional or nationwide exclusivity. We are implementing exclusivity on 35 of the 40 private paging channels at 929-930 MHz, while five channels will continue to be assigned non-exclusively. To qualify for exclusivity, licensees will be required to construct their systems within eight months of licensing, with "slow growth" extensions allowed for large systems under some circumstances. Existing systems that meet the new criteria will be granted immediate exclusivity, and all other existing systems will be grandfathered.

II. BACKGROUND

2. Under our existing rules, all private paging frequencies, including those at 929-930 MHz, are assigned on a non-exclusive basis. When we allocated 929-930 MHz to private paging in 1982, we reasoned that channel sharing was feasible in light of then-existing demand for private paging services, and chose to rely on frequency coordination and licensee cooperation to prevent interference and promote efficient channel use.[1] Since that time, however, the paging marketplace has expanded dramatically. Paging services are increasingly being offered on a wide-area basis through regional and nationwide paging systems, and subscribership has been growing at 15 to 20 percent annually. To meet this growing demand, paging companies have occupied much of the available spectrum on common carrier paging channels and on private paging channels below 900 MHz. Historically, 929-930 MHz has been less heavily used than other paging bands. Nevertheless, demand for these frequencies has increased as alternative spectrum grows scarce.

3. On February 18, 1993, we adopted a Notice of Proposed Rule Making in this proceeding, in which we proposed to implement exclusive frequency assignments for qualified

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[1] Second Report and Order, One-Way Paging Stations in the Domestic Public and the Private Land Mobile Radio Services, Gen. Docket No. 80-183, 91 FCC 2d 1214 (1982) at para. 32.

local, regional, and nationwide 900 MHz private paging systems.[2] The Notice was based on a Petition for Rule Making filed by the Association for Private Carrier Paging Section of the National Association of Business and Educational Radio, Inc. (NABER) and supported by numerous 900 MHz private paging licensees.[3] In the Notice, we tentatively concluded that exclusivity would create a more stable and predictable environment for licensees, thus giving them greater incentive to develop and invest in more efficient paging systems. We also tentatively concluded that exclusivity should be implemented while 929-930 MHz was still relatively uncrowded so that congestion could be prevented before it occurred.

4. We have received 21 comments and 12 reply comments in response to the Notice, most of them supportive of the proposal.[4] American Paging, Arch Communications, ITA, Thomas Luczak, Message Center/Beepage, Metrocall, Metromedia, NABER, PacTel Paging, PageMart, and PageNet generally support the proposal with small modifications. MAP and Metagram support exclusivity but advocate allowing incumbents to expand existing systems before 929-930 MHz is opened to new applicants. Celpage and Porta-Phone argue that we should extend exclusivity to lower band paging licensees as well as 900 MHz licensees. Telocator endorses the proposal, but urges us to commence a broader proceeding addressing the regulatory relationship between private and common carrier paging.[5]

5. Five commenters oppose the proposal, mostly expressing concern that it will give private paging licensees an unfair advantage over common carrier paging licensees. Radiofone argues that granting exclusivity to private paging undermines common carrier paging and violates former Section 332 of the Communications Act.[6] BellSouth and McCaw contend that the proceeding cannot go forward unless we address the broader issue of regulatory parity between private and common carriers. Atlanta Voice Page argues that by addressing only the 929-930 MHz band, the proposal discriminates against lower band PCP licensees. MTel argues that the proposal does not provide sufficient safeguards against warehousing of 929-930 MHz frequencies.

III. DISCUSSION

A. Overview -- Need For Exclusivity

6. Based on the record before us, we conclude that enabling qualified 929-930 MHz paging systems to operate on an exclusive basis is in the public interest for the reasons outlined in the Notice.[7] As demand for 900 MHz paging frequencies increases, continued licensing on a non-exclusive basis threatens to discourage optimally efficient use. Although sharing is

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[2] Notice of Proposed Rule Making, PR Docket No. 93-35, 8 FCC Rcd 2227 (1993) ("Notice").

[3] Petition For Rule Making, RM-7986, filed April 24, 1992.

[4] A list of commenting parties is set forth in Appendix B.

[5] American Paging and PacTel support Telocator's call for a new proceeding.

[6] The comments in this proceeding were filed prior to the recent amendment of Section 332. See para. 7 below.

[7] See Notice at paras. 14-17.

technically feasible, the allotment of air time to multiple licensees imposes significant constraints on the efficiency and quality of service in crowded markets. Moreover, even where no sharing has been necessary in the past, licensees are reluctant to invest in advanced paging technology because of the risk that others will be assigned to the same frequency in the future. Exclusivity will create a more stable, predictable environment that should encourage investment in wide-area, high-capacity paging systems in the 929-930 MHz band.

7. As noted above, some commenters argue that by taking this step, we are blurring the distinction between private and common carrier paging to the disadvantage of the latter. We disagree. First, the distinction between private and common carriage does not turn on whether frequency assignments are exclusive or shared. In fact, numerous private radio services other than paging are already licensed on an exclusive basis. Second, the broader regulatory concerns raised by some commenters have been mooted by the recent amendment of Section 332 of the Communications Act.[8] Under revised Section 332, the regulatory status of each mobile service will be based on whether it is a "commercial mobile service" or a "private mobile service" as defined by the statute.[9] To implement the statute, we have initiated a rule making in which we propose to address the regulatory status of all mobile services.[10] Because we have included the regulatory status of both private and common carrier paging as an issue in that proceeding, we conclude that further discussion of this issue in the instant proceeding is unnecessary.

8. While we do not need to address the regulatory status of private carrier paging in this Order, it should be noted that the actions we take in our Section 332 rule making could affect the regulatory structure we are establishing today for licensing of 929-930 MHz systems. If we decide in that proceeding to reclassify private carrier paging as a commercial mobile service, it may be necessary to modify some of the rules adopted by this Order to accommodate such reclassification, which would take effect three years from the enactment of the new legislation.[11] Whether or not such rule changes are necessary in the future, however, we believe that the rules being adopted today serve the public interest for the reasons stated in this Report and Order.

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[8] Section 332 was amended on August 10, 1993, by Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b), 107 Stat. 312, 392 (1993) ("Budget Act").

[9] See 47 U.S.C. § 332(d).

[10] See Notice of Proposed Rule Making, Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, FCC 93-454 (adopted September 21, 1993, released October 8, 1993), 58 Fed. Reg. 53169 (October 14, 1993).

[11] In the event that private paging services are reclassified, the legislation provides that paging services utilizing frequencies allocated as of January 1, 1993 for private land mobile services (which includes 929-930 MHz) will be treated as private mobile service until three years after enactment, i.e., until August 10, 1996. Budget Act, § 6002(c)(2)(B).

B. Configuration of Protected Systems

1. Number of Transmitters

a. Local systems

9. In the Notice, we proposed to grant local exclusivity to all 900 MHz private paging systems comprised of at least six contiguous transmitters, except in the three largest metropolitan markets, where a larger number of transmitters would be required.[12] The comments support a transmitter-based approach, and virtually all commenters agree that six transmitters is an appropriate threshold. Most commenters also support NABER's original proposal that 18 transmitters be required to obtain local exclusivity in the New York, Los Angeles, and Chicago markets.[13] We conclude that these are reasonable thresholds for obtaining an exclusive local channel assignment. These thresholds should ensure adequate coverage in most markets and should discourage frivolous applications. At the same time, these threshold standards should not unduly favor larger paging systems to the detriment of smaller existing or potential systems. We therefore adopt an 18-transmitter minimum for the three top markets,[14] and a 6-transmitter minimum for all areas outside the top three markets. As proposed in the Notice, a transmitter will be counted towards the minimum only if (1) it is within 25 miles of another transmitter in the system, and (2) it is not co-located with another transmitter being counted toward the minimum on the same frequency.[15]

10. One issue raised by commenters is whether transmitters can be counted towards the minimum if they are not held by a common licensee. Because many paging operators license individual stations through affiliates or subsidiaries, several commenters propose that we allow multiple licensees to aggregate transmitters for purposes of meeting the minimum.[16] We agree

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[12] Notice at paras 19-22.

[13] A few commenters propose more flexible criteria for determining the minimum number of transmitters. See, e.g., American Paging Comments at 6-7 (18 transmitters in top 3 markets, 12 transmitters in Markets 4-20, 9 transmitters in Markets 21-30); Metagram Comments at 3-5 (required number of transmitters should depend on terrain and similar factors affecting signal coverage in particular markets). In our view, however, attempting to tailor the rules more precisely to individual markets would not yield sufficient benefit to justify the added regulatory complexity and administrative burden that would be imposed on applicants and the Commission.

[14] For purposes of this rule making, a "market" is defined as the geographic area specified in Section 90.741 of our rules, which consists of a 37.3 mile (60 kilometer) radius around designated coordinates in each city. Thus, an applicant or licensee who seeks exclusivity within part or all of this area in any of the top three markets must construct a system of at least 18 transmitters.

[15] We will consider multiple transmitters to be co-located if they are situated on a common antenna, building, antenna farm, or similar facility. Licensees are free to install additional transmitters at a single location, but only one such transmitter will be counted towards exclusivity.

[16] See PacTel Comments at 3-4; PageNet Reply Comments at 8.

that this is reasonable so long as all transmitters being counted actually function as part of a single paging system. In other words, we will allow multiple licensees (e.g., affiliates, subsidiaries, joint venture partners) to obtain exclusivity for a single jointly operated system[17] that otherwise meets our criteria, but we will not allow aggregate counting of transmitters in separately operated systems even if they are operated by a common licensee.

b. Regional systems

11. Our proposal for regional exclusivity called for a system of at least 70 transmitters, not necessarily contiguous, situated in no more than 12 adjacent states. We further proposed that in the top 30 markets, a regional system operator would have to construct enough contiguous transmitters to meet the criteria for local exclusivity in that market.[18] Most commenters support this approach, although some argue that the top-30 market requirement is unduly restrictive.[19] PacTel, however, criticizes our regional proposal as arbitrary and proposes an alternative: the United States would be divided into four regions, and regional licensees would be required to serve 12 to 14 markets in a region.[20]

12. We will adopt our original proposal for the reasons stated in the Notice.[21] Although PacTel's alternative offers certain benefits, it is administratively complex, lacks flexibility, and did not garner significant support from other commenters. Rather than requiring regional licensees to serve predetermined areas, we prefer to afford licensees the flexibility to design regional systems that respond to actual market demand, which may vary significantly from region to region. Therefore, we will place no restrictions on the configuration of regional systems other than those contained in our original proposal.

c. Nationwide systems

13. The Notice proposed to grant nationwide exclusivity to systems that consist of at least 300 transmitters, provide service to 50 markets, including 25 of the top 50 markets, and serve at least two markets in each of seven regions modelled on the RBOC regions.[22] Commenters generally support these criteria, although some feel the geographic coverage criteria should be strengthened while others regard them as too rigid. PageMart, for example, would require service to five markets in each of the seven regions, while PageNet proposes requiring coverage of 50% of the population in each region.[23] On the other hand, Metagram and Metrocall propose relaxing some of the proposed criteria for nationwide exclusivity. Metagram contends that the 50-market requirement is too high because it undercounts

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[17] Systems that use interconnected terminals to share time on a common frequency but are otherwise operated separately will not be considered "jointly operated" systems.

[18] Notice at para. 24.

[19] See, e.g., Metagram Comments at 6-8; PacTel Comments at 12-14.

[20] PacTel Comments at 7-10.

[21] See Notice at para. 24.

[22] Notice at paras. 25-27.

[23] PageMart Comments at 14; PageNet Comments at 19-20.

"hyphenated" multi-city markets, and both Metagram and Metrocall oppose the regional distribution requirement.[24]

14. We conclude that our original proposal not only strikes a fair balance among the opposing views stated in the comments, but that it also addresses our concerns regarding geographic coverage and the potential for frequency warehousing. The construction and coverage criteria we are imposing will ensure comprehensive nationwide service, while the capital investment required to construct nationwide systems will be sufficient to discourage attempts to warehouse nationwide paging frequencies. At the same time, licensees who meet these criteria do not require more intrusive regulation to ensure that they provide service where the need exists. We are confident that in today's highly competitive paging market, customer demand will provide sufficient incentive for nationwide licensees to eliminate gaps in their coverage.

15. Several commenters urge us to modify our proposal limiting nationwide exclusivity to the continental United States, and request that we include Alaska, Hawaii, and Puerto Rico as well.[25] We will adopt this suggestion, which gives nationwide licensees flexibility to extend service to customers who live in or travel to these locations. Another suggestion by some commenters is that we allow local systems to offer "fill-in" service in unserved areas on nationwide frequencies so long as there is no interference with the nationwide licensee's operations. We decline to adopt this proposed modification. The purpose of nationwide exclusivity is not only to prevent interference with existing operations, but to provide an incentive for future expansion of coverage by nationwide licensees. Allowing local systems to fill in currently unserved areas on nationwide frequencies would eliminate this incentive and foreclose future expansion by nationwide systems.

2. Multi-Frequency Transmitters

16. Many commenters raise the issue of whether licensees should be allowed to count the same transmitter for exclusivity purposes on more than one frequency. In part because of the shared frequency environment, many private paging licensees have developed systems that use "frequency-agile" transmitters capable of transmitting on multiple frequencies. One option, advocated by Arch, PacTel, PageNet, and others, would be to allow licensees to count these transmitters on each operating frequency, so that an operator could qualify for multi-channel exclusivity based on a single set of transmitters.[26] Another option, advocated by PageMart, would be to allow licensees to use frequency-agile transmitters, but to "count" each such transmitter on only one of its operating frequencies.[27]

17. We prefer the latter approach. The primary purpose of requiring a minimum number of transmitters is to discourage warehousing and speculation by ensuring that licensees make a significant capital investment to build a qualifying system. If we were to allow repeated

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[24] Metagram Comments at 9; Metrocall Comments at 6.

[25] NABER Comments at 15-16; PacTel Paging Comments at 11; American Paging Reply Comments at 7.

[26] See Arch Comments at 3-4; Thomas Luczak Comments at 2-3; PageNet Comments at 14-15; American Paging Reply Comments at 2-3

[27] PageMart Comments at 8-10.

"counting" of the same transmitter, licensees could claim multi-channel exclusivity with no more investment than is required to earn single-channel exclusivity. To prevent the potential hoarding of multiple frequencies, we believe paging operators seeking more than one exclusive frequency should be required to meet a higher investment threshold. Therefore, we will allow multi-frequency transmitters to be counted only once for exclusivity purposes. A licensee using multi-frequency transmitters may qualify for exclusivity on two frequencies, however, by constructing twice the number of transmitters required to obtain one channel.[28]

C. Scope of Protection

18. We proposed in the Notice to protect qualified local or regional systems by applying minimum separation standards to placement of subsequent co-channel systems. We proposed to calculate the required separation based on the antenna height and transmitter power of the respective systems, using the same height/power table that is used for 930-931 MHz common carrier paging systems.[29] Virtually all commenters support this approach, but some also urge us to increase the maximum effective radiated power (ERP) for private paging licensees from 1000 watts, the current limit, to 3500 watts.[30] These commenters note that nationwide common carrier paging licensees are already allowed to operate at 3500 watts, that non-nationwide 931 MHz licensees may also operate at 3500 watts within pre-existing service areas, and that we have recently proposed to allow non-nationwide licensees to use 3500 watts outside their pre-existing service areas as well.[31]

19. We conclude that the separation standards proposed in the Notice should be adopted as the basis for co-channel protection, and that the current ERP limit of 1000 watts will be retained for local and regional systems. If we were to allow local and regional systems to operate at higher power under the new rules, the resulting minimum separations between co-channel stations would leave less room for entry by new systems. We are also not persuaded that our pending common carrier power proposal automatically justifies a similar increase for private paging systems. That proposal is premised on the nature of the common carrier paging market, which has matured to the point where demand for 931 MHz frequencies is largely confined to expansion of existing systems.[32] At 929-930 MHz, contrastingly, we believe

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[28] For example, a system comprised of 12 dual-frequency transmitters would qualify for local exclusivity on both frequencies provided that all other geographic and technical criteria are met. Similarly, a nationwide licensee may obtain exclusivity on two frequencies based on a system of 600 dual-frequency transmitters. As discussed below, however, a non-grandfathered applicant seeking to construct a multi-frequency system will initially be assigned only one frequency pending construction and operation of the system.

[29] Notice at para. 23.

[30] See, e.g., American Paging Comments at 9-10; Celpage Comments at 11-12; PacTel Paging Comments at 17-18; PageNet Comments at 15-17.

[31] See Report and Order, Height and Power Increases in the Public Mobile Service, 4 FCC Rcd 5303 (1989), modified on recon., 5 FCC Rcd 4604 (1990); Notice of Proposed Rule Making and Order Granting Petition For Waiver, CC Docket No. 93-116, 8 FCC Rcd 2796 (1993).

[32] See Notice of Proposed Rule Making and Order Granting Petition For Waiver, 8 FCC Rcd 2796 (1993) at para. 3.

opportunities for new entry continue to exist, which would be diminished by increasing power limits at this time. This does not apply, however, to 929-930 MHz frequencies occupied by licensees who qualify for nationwide exclusivity. Because there will be no opportunity for new entry on these frequencies, we are increasing the maximum ERP for nationwide licensees to 3500 watts.[33]

D. Channel Allotment

20. In the Notice, we proposed to make 35 of 40 channels available on an exclusive basis, while five channels would continue to be licensed on a shared basis. We further proposed to eliminate the division of 929-930 MHz into separate pools for commercial and non-commercial service. Thus, commercial and non-commercial applicants would be equally eligible to apply for all channels.[34] The comments uniformly support these proposals. NABER and American Paging, however, suggest that two of the five frequencies that we proposed to designate for shared use should be replaced by other, less heavily occupied frequencies.[35] No other party objected to the alternative frequencies proposed by NABER.

21. After review of our licensing records, we have decided to designate four of the five originally proposed frequencies (929.0375, 929.0875, 929.1625, and 929.2625) for shared use, but to substitute 929.0625 for 929.3375 as the fifth shared frequency. Based on applications coordinated and filed prior to the Notice, we have recently licensed American Paging to construct a wide-area system on 929.3375, making it less suitable for designation as a shared frequency. Current licensing on the other four frequencies, however (including 929.0875, the other frequency questioned by NABER), is relatively light and consists primarily of small, local systems that would not qualify for exclusivity in any event. Of the alternative frequencies proposed by NABER, 929.0625 appears to be the least heavily used, providing ample capacity for additional shared use without prejudice to existing licensees.

E. Prerequisites for Exclusivity

1. Construction Period

22. The Notice proposed to grant applicants' requests for exclusivity conditioned on construction of a qualified system within 8 months of licensing. For a system of more than 30 transmitters, we proposed to allow applicants to request an extension of up to three years based on a showing of need, a construction timetable, and evidence of financial ability to construct the system, or, alternatively, a performance bond.[36] Most commenters support these proposals, but some parties differ on whether the slow-growth provisions are reasonable. Arch proposes to extend the slow-growth period to four years for nationwide systems, while American Paging

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[33] Although we will allow nationwide licensees to operate at higher power, this does not affect their obligation to cooperate and avoid interference with grandfathered licensees who continue to share their frequencies.

[34] Notice at paras 28-29.

[35] American Paging Comments at 4-6; NABER Comments at 6-8.

[36] Notice at paras. 30-31.

suggests five years.[37] PageNet advocates shortening the slow-growth period to 18 months, a position opposed by Message Center and PageMart.[38] MTel opposes any slow-growth option.[39] PacTel supports slow-growth, provided that licensees are not allowed to extend the ordinary 8-month limit by obtaining license modifications.[40] In general, commenters support imposing a bond requirement on slow growth applicants, either in the form of a performance bond, as suggested in the Notice,[41] or a forfeiture bond.[42]

23. We adopt the 8-month construction requirement as proposed, and further adopt PacTel's proposal that the 8-month period remain tied to the original licensing date even if subsequent license modifications are granted. With respect to slow-growth extensions, we conclude that a three-year maximum is appropriate, but we emphasize that extensions may be shorter where a three-year period is not justified.[43] To obtain an extension, a slow growth applicant must state the reasons why an extension is needed and provide a construction timetable demonstrating that the extension period requested is reasonable. The applicant must also provide a construction cost estimate[44] and must either place a sum equal to the estimate in an escrow account or obtain a performance bond payable in that amount.[45] As construction of the system proceeds, the licensee may draw from the escrow account or reduce the bond amount

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[37] Arch Comments at 4-6; American Paging Reply Comments at 5.

[38] PageNet Comments at 9-11; Message Center Reply Comments at 2; PageMart Reply Comments at 12.

[39] MTel Comments at 7-8.

[40] PacTel Comments at 15-17.

[41] Notice at para. 31 n.46.

[42] See, e.g., PacTel Paging Comments at 15-17 (advocating forfeiture bond based on Section 503 of the Communications Act).

[43] The slow-growth option will be limited to new applications only. We will not grant requests to extend the construction period for grandfathered licenses.

[44] In its petition for rule making, NABER estimated the average cost of constructing a 900 MHz paging system to be $20,000 per transmitter. Petition for Rule Making, RM-7986, at 9 n.16. A slow-growth applicant who establishes an escrow fund or obtains a bond equal to $20,000 for each proposed transmitter and who otherwise meets our slow-growth criteria will be presumed to qualify for an extension. An applicant whose request is based on a cost estimate lower than $20,000 per transmitter will not receive this presumption and must submit an itemized statement demonstrating that the reduced estimate is reasonable.

[45] If a performance bond is used, the surety on the bond must be a surety company deemed acceptable within the meaning of 31 U.S.C. § 9304 et seq. (see, e.g., Department of the Treasury Fiscal Service, Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and As Acceptable Reinsuring Companies, 57 Fed. Reg. 29356 (1992)). The bond must name the United States Treasury as beneficiary in the event of the licensee's default.

to reflect costs incurred.[46] If the licensee fails to construct all or part of the proposed system within the slow-growth period, the escrow balance or the outstanding principal on the bond will be paid to the United States Treasury.

24. As proposed in the Notice, construction deadlines will be strictly enforced, and licensees who fail to construct will forfeit their protected status and be barred from applying for any new authorization in the same area for one year. Nevertheless, if an applicant constructs fewer sites than proposed in its application, but the constructed system still qualifies for protected status, exclusivity will be extended to the constructed system.[47] PageNet argues that slow-growth licensees should forfeit all exclusivity rights to discourage applicants from deliberately filing overreaching proposals and then underbuilding.[48] In light of the financial commitment required of slow-growth applicants, however, we do not believe such an "all-or-nothing" sanction is required.

2. Technical Standards

25. In the Notice, we proposed that PCP systems comply with certain technical standards to qualify for exclusivity.[49] The comments uniformly support these proposals. Accordingly, we adopt the standards set forth in the Notice: to count towards exclusivity, transmitters in local, regional, and nationwide systems must be capable of at least 100 watts output power,[50] must have simulcast capability, and must in fact be operated as part of a single operating system.

3. Loading Requirements

26. We did not propose loading requirements in the Notice, based on our tentative conclusion that such requirements are impractical and burdensome.[51] This view is supported by the majority of comments.[52] We continue to believe that loading requirements are not workable in this context, and we therefore will not adopt a loading standard.

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[46] The amount by which the escrow or bond is reduced for partial construction may not exceed the originally estimated construction cost of that portion of the system, even if the licensee's actual cost was higher.

[47] Unconstructed licenses will be subject to forfeiture and reassignment. As proposed, we will apply our finder's preference rules to PCP licensees who obtain exclusive frequency assignments and then fail to construct or operate their systems as proposed.

[48] PageNet Comments at 9-11.

[49] Notice at para. 32.

[50] This does not mean that transmitters must actually be operated at 100 watts. So long as each transmitter has 100 watt capability, the licensee may operate at any appropriate power within the limits set forth in Section 90.494(f).

[51] Notice at para. 33.

[52] Only two commenters, MTel and PageNet, advocate loading standards, and neither presents a specific proposal. MTel Comments at 6-7; PageNet Reply Comments at 14.

4. Exclusivity on Multiple Channels

27. To prevent hoarding of multiple frequencies, we proposed to limit applicants to one exclusive frequency assignment at a time at any location. Licensees would be allowed to apply for a second exclusive frequency in the same area only upon completion of construction and commencement of operation of a qualified system on the initial frequency.[53] Most commenters agree that assignment of a second frequency should be conditional on actual use of the initial frequency.[54] Several commenters also seek assurance that our multi-frequency rules will not preclude them from using frequency-agile transmitters to qualify for a second frequency.[55]

28. We adopt the proposal substantially as set forth in the Notice. Applicants will be assigned a single frequency pending construction and commencement of operations, at which point they may apply for a second frequency in the same area (assuming a second frequency is available). A licensee who proposes to construct a system with frequency-agile capability will also be authorized initially on one channel only. Once such a system is constructed and operational, the licensee may obtain authorization for a second frequency (again assuming availability) provided it meets our multi-frequency transmitter criteria discussed in Part III.B.2. above, i.e., the system contains twice the number of transmitters required to obtain one exclusive channel.[56]

F. Application to Existing Systems

29. Our proposal for treatment of existing 900 MHz private paging systems provided that exclusivity would be granted to all incumbent systems that qualified for protection under the new rules. In addition, all incumbent systems would be grandfathered regardless of whether they qualified for exclusivity.[57] The rights of incumbents would be based on their existing authorizations, whether constructed or unconstructed, as of the effective date of the rules. With respect to applications for new transmitter sites once the new rules are in effect, we proposed that incumbents and new licensees would be treated equally, except that a preference would be

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[53] Notice at para. 34.

[54] See, e.g., Arch Comments at 3-4; MAP Mobile Comments at 8 n.13; Message Center/Beepage Comments at 3. Only Celpage and Metagram argue that licensees should be restricted to one exclusive frequency under all circumstances. Celpage Comments at 9-10; Metagram Comments at 14.

[55] See Arch Comments at 3-4; Luczak Comments at 3; PageMart Comments at 10-12; PageNet Reply comments at 9.

[56] See para. 17, supra. The multi-frequency requirements are the same for grandfathered systems, except that we will not withhold exclusivity on the second frequency pending construction of the system. For example, if a licensee is currently operating or authorized to construct a 12-transmitter dual-frequency system that meets our local exclusivity criteria, it will be protected on both frequencies to the extent of that authorization. On the other hand, a 6-transmitter dual frequency system is only entitled to exclusivity on one frequency, although operations on the second frequency will be grandfathered.

[57] Notice at paras. 35-36.

granted in favor of expansion of existing systems in mutually exclusive situations.[58]

30. The vast majority of commenters support grandfathering of all systems in place and granting exclusivity to those systems that already meet the criteria set forth in the new rules. PacTel, PageMart, and PageNet express concern, however, about whether protection should be extended to licenses based on applications filed since the adoption of the Notice.[59] MAP and Metagram propose that incumbents be allowed time to build out their systems before new systems are licensed, after which incumbent exclusivity would be based on actual construction.[60] This concept is opposed by Arch, Metromedia, and PageNet, who argue against any tilt in favor of incumbents with respect to future expansion rights.[61] American Paging goes further and proposes that exclusive licensees be allowed to move non-exclusive grandfathered systems to shared frequencies provided the new entrant pays the cost of relocation.[62]

31. We conclude that our original proposal constitutes the simplest and fairest way to balance the interests of incumbents and new entrants. In our view, incumbents who are already operating or constructing systems that meet the new exclusivity criteria should be afforded protection against new co-channel systems in their service areas, but the rules should not require any incumbent, regardless of size, to relocate, change frequencies, or otherwise curtail previously authorized construction or operations.[63] Therefore, all incumbent licensees will be grandfathered with respect to their existing systems, and those who meet our criteria will be granted exclusivity.[64] It should be emphasized that this protection is only against new co-channel licensing: to the extent that grandfathered licensees are currently sharing frequencies with each other, they must continue to comply with the obligations of mutual cooperation and non-interference that have applied previously.[65]

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[58] Id. at para. 37.

[59] PacTel Comments at 22, Reply Comments at 15; PageMart Reply Comments at 11-12; PageNet Reply Comments at 19-20.

[60] MAP Comments at 6-8; Metagram Comments at 15-18.

[61] Arch Reply Comments at 10-11; Metromedia Reply Comments at 7-9; PageNet Reply Comments at 19-20.

[62] American Paging Comments at 8-9.

[63] Of course, this does not preclude co-channel licensees from voluntarily entering into relocation agreements.

[64] Licenses granted based on applications filed prior to the Sunshine Notice date for this Report and Order, i.e., October 14, 1993, will be treated as incumbent licenses entitled to grandfathered status.

[65] PageNet raises the question of how our grandfathering rules apply to a situation where incumbent Licensee A has qualified for nationwide exclusivity, but has not yet established a presence in a market where incumbent Licensee B has qualified for local exclusivity on the same frequency. PageNet Reply Comments at 4-6. Should that situation arise, we will require the two licensees to share the frequency if and when Licensee A enters that market. We emphasize, however, that this applies only to grandfathered systems. A non-grandfathered nationwide licensee may not encroach on an area where another

G. Future Licensing

32. With respect to future expansion, we will process all future applications for 900 MHz paging licenses on a first-come, first-served basis, regardless of whether the applicant is adding transmitter sites to an existing system or establishing a new system. Applications for new licenses will be accepted only if the resulting system qualifies for exclusivity under our rules and does not violate our minimum separation standards with respect to other systems that have previously qualified for exclusivity on the same frequency.[66]

33. In the event of simultaneously filed mutually exclusive applications, we will grant a dispositive preference, as proposed in the Notice, in favor of an application to expand an existing system over an application to construct a new system.[67] Thus, where an existing licensee files to obtain an exclusive frequency for expansion of its system, other entities simultaneously applying to construct new systems in the same area will not be eligible to compete for that frequency and such applications will be dismissed as unacceptable for filing. Although this eligibility restriction may result in the licensing of fewer competing paging systems in a given area, we find it to be in the public interest for several reasons. First, the restriction will tend to encourage development of systems that cover a larger area over those that cover a smaller area.[68] Because increased coverage allows customers greater mobility without loss of access to service, we believe that wider-area systems are generally more beneficial to paging customers and more responsive to the rising demand for paging services. Second, allowing existing licensees to expand their service area will result in broader coverage for existing users of those systems, whereas authorizing a new competing system would prevent such users from obtaining expanded coverage without subscribing to both services. Third, by encouraging expansion of existing systems, the restriction will promote rapid access to wide-area service for new users as such systems reach new areas, whereas applicants who have yet to construct any portion of their systems would generally require more time to make wide-area service available.[69]

34. At the same time, we decline to adopt the suggestion of some commenters that existing licensees be afforded an extended period in which to to expand their systems before

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licensee has previously qualified for local or regional exclusivity.

[66] Consequently, grandfathered licensees may not add stations to their existing systems in areas where a co-channel licensee has qualified for exclusivity. Even where expansion is not allowed, however, we will allow grandfathered licensees to make minor modifications needed to maintain an existing system (e.g., relocation of a transmitter upon expiration of site lease).

[67] Notice at para. 37.

[68] We emphasize, however, that this restriction does not benefit only large systems. For example, a licensee with an existing local system will be entitled to preference over an applicant who submits a conflicting proposal to build a new larger system.

[69] The Commission's authority to set threshold eligibilty restrictions of this type is well-established. See, e.g., United States v. Storer Broadcasting, 351 U.S. 192 (1956); Hispanic Information & Telecommunications Network, Inc. v. FCC, 865 F.2d 1289 (D.C. Cir. 1989).

applications for new systems are accepted. Such a preference, in our view, would impose too severe a disadvantage on new applicants and could delay the advent of service in areas where new applicants are prepared to provide service but expansion by existing licensees is unlikely to occur.

35. With respect to simultaneous mutually exclusive applications where no party is entitled to a preference, we have proposed to select licensees by competitive bidding pursuant to the legislation recently enacted by Congress as part of the Omnibus Budget Reconciliation Act.[70] We are not adopting specific bidding procedures at this time, however, but will defer action on mutually exclusive applications until the conclusion of our pending rule making on competitive bidding procedures.[71]

H. Lower Band PCP Systems

36. In the Notice, we declined to propose the implementation of exclusive licensing for private paging systems operating below 900 MHz. We noted that different operating conditions and greater congestion on these frequencies made exclusivity more problematic and difficult to implement than at 900 MHz. Nevertheless, we sought informal comment on how to promote efficient use of lower band paging frequencies.[72]

37. Most commenters respond that issues relating to the lower bands are beyond the scope of this proceeding and should be addressed separately.[73] Some lower band licensees argue, however, that adopting exclusivity at 900 MHz without addressing lower band issues could lead to inconsistent regulation and increased lower band congestion.[74] Some parties also contend that lower band exclusivity is feasible because congestion is not severe except in a few major markets. Several alternatives to exclusivity are suggested, including caps on frequency sharing, mandatory interconnection of terminals, and encouraging migration to less crowded frequencies.[75]

38. In our view, the regulation of private paging below 900 MHz remains outside the scope of this proceeding. The comments confirm that operating conditions in the lower bands are significantly different from those at 900 MHz. Because of better signal propagation characteristics and lower operating costs, the lower bands are highly sought-after in major

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[70] See 47 U.S.C. § 309(j) (added by the Budget Act, § 6002(a), 107 Stat. 312, 387 (1993)).

[71] See Notice of Proposed Rule Making, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, FCC 93-455 (adopted September 23, 1993, released October 10, 1993).

[72] Notice at paras. 38-39.

[73] See, e.g., NABER Reply Comments at 5-6; PacTel Paging Reply Comments at 15-16; PageMart Reply Comments at 4.

[74] See, e.g., Celpage Comments at 7-9; Atlanta Voice Page Letter Comments at 1. Atlanta Voice Page argues that our proposal benefits only larger PCP operators who can afford the high operating costs at 900 MHz, while smaller operators will be penalized.

[75] See Message Center Comments at 4-7; Porta-Phone Comments at 4-5.

markets, even in a shared environment. We believe that this will continue to be the case after exclusivity is implemented at 900 MHz and are therefore not persuaded that similar action is required in the lower bands. Even assuming that lower band congestion were to merit remedial action in the future, the operational differences between 900 MHz and the lower bands suggest that such issues can and should be dealt with independently. We therefore decline to address these issues further in this proceeding.

I. Frequency Coordination

39. In the Notice, we proposed to continue relying on frequency coordination in the assignment of exclusive frequencies, but to allow 900 MHz paging applicants to select from among competing coordinators.[76] Most commenters strongly oppose allowing more than one coordinator to offer coordination service and favor retaining NABER as the sole coordinator. These parties praise NABER's coordination efforts and contend that multiple coordinators will create confusion and delay in the licensing process.[77] ITA, on the other hand, supports our proposal, arguing that it is prepared to offer coordination services and that the problems predicted by opponents of the proposal are exaggerated.[78]

40. After consideration of the numerous comments on this issue, we conclude that NABER will continue as coordinator for this service, but that additional coordinators will be authorized if certain conditions are met. During the initial implementation and commencement of licensing under this Order, we find that the transition of 900 MHz paging from shared to exclusive frequency assignments presents unique considerations that weigh against immediately authorizing multiple coordinators without additional certification steps. First, as noted above, the Commission is relying on NABER's existing data base and computer capabilities to determine the exclusivity rights of incumbents. Second, because each application that is filed with the Commission will affect the possible placement of future stations, future licensing requires the creation, maintenance, and constant updating of the coordination data base to reflect pending applications. We are prepared to introduce additional coordinators into this process, however, once we are assured that they are capable of developing such a data base and exchanging data base information instantaneously with other coordinators. We believe this objective is achievable, and that any coordinator that can demonstrate that it is capable of meeting these conditions should allowed to offer coordination services to applicants. In furtherance of this objective, we delegate authority to the Chief of the Private Radio Bureau to develop specific standards for those who wish to provide coordination service at 929-930 MHz and to authorize coordination as soon as possible by those who demonstrate the ability to meet those standards.

J. Conditional Operation

41. Our current rules for 929-930 MHz generally allow private paging applicants to operate under a conditional permit upon filing of an application with the Commission, provided that the application is accompanied by evidence of frequency coordination and that certain other

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[76] Notice at para. 40.

[77] See, e.g., American Paging Comments at 11; Celpage Comments at 13-14; PageMart Comments at 16-17.

[78] ITA Reply Comments at 5-12. ITA is joined in its reply comments on this issue by the Council for Independent Communications Suppliers.

conditions are met.[79] Because we are continuing to require coordination of all 900 MHz private paging applications, we will continue to allow conditional operation under the conditions specified in the rules. We are making one minor modification to these conditions, however, to allow conditional operation of 929-930 MHz stations located above "Line A," i.e., within 250 miles of the Canadian border. Previously, we did not allow conditional operation of such stations because applications above Line A on these frequencies required coordination with Canada to protect certain Canadian fixed stations.[80] In July 1992, however, the Commission and Canada's Department of Communications agreed that such coordination was no longer necessary at 929-930 MHz.[81] We have received a petition from PageNet requesting that we amend our conditional permit rules to conform to this agreement.[82] Although this matter was not raised in the Notice in this proceeding, we consider this to be a minor and non-controversial matter in which the public is unlikely to be interested. Accordingly, we find good cause to conclude that notice and comment is unnecessary.[83] Therefore, we are amending our rules to allow conditional operation of 929-930 MHz stations above Line A, provided all other requirements of our rules are met.

K. Transition Procedures

42. To facilitate the transition from shared to exclusive licensing, we are implementing the following procedures. Within thirty days of the effective date of this Order, any incumbent licensee that believes it qualifies for exclusivity based on existing construction or authorizations shall submit a request for designation of exclusive status to NABER.[84] The request shall provide information demonstrating that the licensee's paging system qualifies for exclusivity under the criteria set forth in this Order. NABER will review all submissions, confirm that they meet our exclusivity criteria, and forward confirmed requests to the Commission for final review, approval, and entry into our licensing data base. Once this process is complete, we will begin processing new applications. New applicants will be required to provide the exclusivity information described above as part of their application. Further details of these procedures will be provided by Public Notice.

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[79] See 47 CFR § 90.159(b).

[80] See Interim Coordination Considerations for the Band 929-932 Mhz, dated September 14, 1993.

[81] Letter from Robert W. McCaughern, Deputy Director General, Engineering Programs Branch, Department of Communications, Government of Canada, to Bruce Franca, Deputy Chief Engineer, Office of Engineering and Technology, dated July 22, 1992.

[82] Petition for Rule Making, Temporary Licensing of Private Carrier Paging Stations Above Line A (filed August 9, 1993).

[83] See 5 U.S.C. § 553(b)(B). Accordingly, we are dismissing PageNet's rule making petition as moot.

[84] Applicants who have filed applications prior to October 14, 1993 but have not yet received a license grant may submit the request as a modification to their applications.

IV. CONCLUSION

43. This action is a significant step in meeting the public's demand for competitive and innovative paging services. By enabling 929-930 MHz licensees to earn exclusivity, it prevents frequency congestion and provides incentives for licensees to invest in superior technology. The new rules also encourage the successful development of local, regional, and nationwide paging systems, thereby balancing the interests of small and large paging operators alike. For these reasons, we adopt the proposal set forth in our Notice as modified in this Report and Order.

V. FINAL REGULATORY FLEXIBILITY ANALYSIS

44. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

A. Need and purpose of this action.

45. This Report and Order amends Part 90 of the Commission's rules to provide channel exclusivity to qualified private paging systems on certain channels at 929-930 MHz. This change will promote the efficient use of paging channels by encouraging investment in new paging technology and the development of more efficient paging systems providing local, regional, and nationwide service.

B. Summary of issues raised by public comments in response to the Initial Regulatory Flexibility Analysis.

46. Only one party, Radiofone, filed comments responding to the Initial Regulatory Flexibility Analysis (IRFA).[85] Radiofone argues that we have not adequately addressed the impact of our proposal on small paging systems and that exclusive licensing will preclude small business entry at 900 MHz.

C. Significant alternatives considered and rejected.

47. Radiofone proposes no alternative means of addressing small business issues other than outright rejection of our proposal. We disagree with the contention that such issues have not been addressed in this proceeding and find this Order to be fully consistent with our small business policy objectives. As discussed in the IRFA, this action does impose certain conditions on the licensing of smaller 929-930 MHz paging systems,[86] but these requirements are not unduly burdensome. The new rules contain significant benefits for small businesses by protecting dozens of small existing systems in place, allowing many such systems to obtain exclusivity, and creating opportunities for expansion and new entry by small business licensees.

VI. ORDERING CLAUSES

48. Accordingly, IT IS ORDERED that, pursuant to the authority of Sections 4(i), 303(g), 303(r), and 332(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(g), 303(r), and 332(a), Part 90 of the Commission's Rules, 47 CFR Part 90, IS

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[85] Radiofone Reply Comments at 8-9.

[86] See IRFA (Notice, Appendix B).

AMENDED as set forth in Appendix A below.

49. IT IS FURTHER ORDERED that this Report and Order will be effective thirty days after publication in the Federal Register.

50. IT IS FURTHER ORDERED that PageNet's Petition for Rule Making, filed August 9, 1993, is DISMISSED as moot.

51. IT IS FURTHER ORDERED that this proceeding is TERMINATED.

52. For further information regarding this Report and Order, contact David L. Furth, Private Radio Bureau, Policy and Planning Branch, (202) 634-2443.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

Part 90 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 90 -- PRIVATE LAND MOBILE RADIO SERVICES

1. The authority citation for Part 90 continues to read as follows:

Authority: Sections 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303 and 332, unless otherwise noted.

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2. Section 159 is amended by revising paragraph (b)(1) to read as follows:

§ 90.159 Temporary and conditional permits.

* * * * *

(b) * * *

(1) For applicants proposing to operate below 470 MHz, that the proposed station location is south of Line A or west of Line C as defined in § 90.7; for applicants in the one-way paging 929-930 MHz band, that the proposed station location is west of Line C as defined in § 90.7.

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3. Section 175 is amended by revising paragraph (c) to read as follows:

§ 90.175 Frequency coordination requirements.

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(c) For frequencies in the 929-930 MHz band. A statement from the coordinator recommending the most appropriate frequency. For applications under Section 90.495, the coordinator's statement must verify that the proposed system meets the requirements of that section.

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4. Section 494 is revised to read as follows:

§ 90.494 One-way paging operations in the 929-930 MHz band.

(a) The following frequencies are available to all eligible Part 90 users for one-way paging systems on an exclusive basis as provided under Section 90.495:

929.0125	929.3125	929.4875	929.6625	929.8375
929.1125	929.3375	929.5125	929.6875	929.8625
929.1375	929.3625	929.5375	929.7125	929.8875
929.1875	929.3875	929.5625	929.7375	929.9125

929.2125	929.4125	929.5875	929.7625	929.9375
929.2375	929.4375	929.6125	929.7875	929.9625
929.2875	929.4625	929.6375	929.8125	929.9875

(b) The following frequencies are available to all eligible Part 90 users for one-way paging systems on a shared basis only and will not be assigned for the exclusive use of any licensee.

929.0375	929.0625	929.0875	929.1625	929.2625

(c) All frequencies listed in this section may be used to provide one-way paging communications to persons eligible for licensing under subpart B, C, D, or E of this part, representatives of Federal Government agencies, and individuals. The provisions of § 90.173(b) apply to all frequencies listed in this section.

(d) Licensees on these frequencies may utilize any type of paging operation desired (tone only, tone-voice, digital, tactile, optical readout, etc.).

(e) There shall be no minimum or maximum loading standards for these frequencies.

(f) Except as provided in paragraph (g) of this section, the effective radiated power and antenna height for base stations providing one-way paging service in the frequency band 929-930 MHz must not exceed 1 kilowatt (30 dBw) and 304 meters (1000 feet) above average terrain (AAT), or the equivalent thereof determined from the following table:

Antenna height (AAT) [meters/(feet)]		Effective radiated power (ERP) (watts)
Above 1357	(4500)	65
Above 1205 to 1357	(4000 to 4500)	70
Above 1056 to 1205	(3500 to 4000)	75
Above 904 to 1056	(3000 to 3500)	100
Above 762 to 904	(2500 to 3000)	140
Above 609 to 762	(2000 to 2500)	200
Above 457 to 609	(1500 to 2000)	350
Above 304 to 457	(1000 to 1500)	600

(g) Stations operating as part of nationwide paging systems under Section 90.495(a)(3) may operate at a maximum effective radiated power of 3500 watts.

* * * * *

5. Section 90.495 is added to read as follows:

§ 90.495 Channel exclusivity for local, regional, and national paging systems.

(a) Applicants for commercial or non-commercial private paging stations in the 929-930 MHz band are eligible for channel exclusivity based on the minimum separation standards provided in this section. To qualify for exclusivity, applicants must construct and operate a local, regional, or nationwide paging system that conforms to the following criteria:

(1) A local system must consist of at least six contiguous transmitters, except in the New York, Los Angeles, and Chicago markets, as defined in Section 90.741 of our rules, where 18 contiguous transmitters are required. For purposes of this section, transmitters will be considered contiguous if:

(i) each transmitter is located within 25 miles (40 kilometers) of at least one other transmitter in the system;

(ii) the combined areas defined by a 12.5 mile radius around each transmitter form a single contiguous area; and

(iii) no transmitter is co-located with any other transmitter being counted as part of a local system for purposes of this section.

Transmitters will be considered co-located for purposes of this section if they are situated on a common antenna, building, antenna farm, or similar facility.

(2) A regional system must consist of 70 or more transmitters, not necessarily contiguous as defined in paragraph (a)(1) of this section, located in no more than twelve adjacent states in the continental United States. In each of the top thirty markets listed in Section 90.741, no transmitter may be counted as part of a regional system under this paragraph unless it would also qualify as part of a local system under paragraph (a)(1) of this section.

(3) A nationwide system must consist of 300 or more transmitters in the continental United States, Alaska, Hawaii, and Puerto Rico, and must provide service to at least 50 markets listed in Section 90.741, including 25 of the top 50 markets and two markets in each of the following regions:

(i) Region 1 -- Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, Vermont

(ii) Region 2 -- Delaware, District of Columbia, Maryland, New Jersey, Pennsylvania, Virginia, West Virginia

(iii) Region 3 -- Illinois, Indiana, Ohio, Michigan, Wisconsin

(iv) Region 4 -- Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee

(v) Region 5 -- Arkansas, Kansas, Missouri, Oklahoma, Texas

(vi) Region 6 -- Arizona, Colorado, Idaho, Iowa, Minnesota, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, Wyoming

(vii) Region 7 -- California, Nevada

(4) No transmitter may be counted as part of a local, regional, or nationwide system under this section unless it is capable of at least 100 watts output power, has simulcast capability, and is to be operated as part of the paging system for which channel exclusivity is sought. Transmitters that are part of a single paging system need not be

licensed to a single entity to comply with this requirement.

(5) Frequency-agile transmitters may be counted no more than once for purposes of this section. A licensee using frequency-agile transmitters may qualify for exclusivity on a second frequency by constructing twice the number of transmitters required to obtain exclusivity on a single frequency, provided that all other requirements of this section are met.

(6) The provisions of this section apply solely to the frequencies listed in Section 90.494(a).

(b) If a paging licensee qualifies for exclusivity under paragraph (a) of this section, no co-channel authorization may be granted to another applicant except in compliance with the separation requirements set forth in this paragraph.

(1) The following table of heights and powers is used to classify all 929-930 MHz paging stations:

Average antenna height above average terrain [meters/(feet)]		Station class					
1206-1526	(4001-5000)	G	G	F	E	F	F
862-1205	(2826-4000)	H	G	G	F	F	F
610-861	(2001-2825)	K	H	H	G	F	F
427-609	(1401-2000)	L	K	H	G	G	G
304-426	(1001-1400)	L	L	K	H	G	G
177-303	(581-1000)	L	L	L	L	K	H
0-176	(0-580)	L	L	L	L	L	L
		125	250	500	1000	1860	3500

Effective radiated power (watts)

(2) The minimum distance between each co-channel station and each transmitter in a system qualified for local or regional exclusivity under paragraph (a) of this section is determined by the following table:

Station Class	Minimum separation between co-channel stations [kilometers/(miles)]				
L	112 (70)				
K	120 (75)	125 (78)			
H	128 (80)	133 (83)	138 (86)		
G	163 (101)	168 (104)	173 (107)	187 (116)	
F	223 (139)	227 (142)	233 (145)	247 (154)	275 (171)
	L	K	H	G	F

Station class

(3) No co-channel authorization will be granted in the continental United States,

Alaska, Hawaii, or Puerto Rico on any frequency assigned to a nationwide paging system as defined in paragraph (a)(3) of this section.

(4) The separation standards set forth in this section do not apply to the placement of co-channel stations that have been authorized on or prior to October 14, 1993 or that are subsequently authorized based on applications filed with the Commission on or prior to October 14, 1993.

(c) A proposed paging system that meets the criteria for channel exclusivity under paragraph (a) of this section will be granted exclusivity under this section at the time of initial licensing. Such exclusivity will expire unless the proposed system (or a sufficient portion of the system to qualify for exclusivity) is constructed and operating within eight months of the licensing date. If exclusivity expires for failure to construct a qualified system:

(1) the licensee may operate constructed stations, but such operation will be secondary to that of any licensee who qualifies for exclusivity under this section; and

(2) the licensee may not apply for any new station authorization in the previously proposed service area for one year from the expiration of exclusivity.

(d) Applications for channel exclusivity may request no more than one frequency in each location to be served. No applicant or affiliate of an applicant may apply for an additional frequency in an area that is the subject of the applicant's prior application unless the system proposed in the prior application has been constructed, is operating, and meets the criteria set forth in paragraph (a) of this section.

(e) Paging licensees may obtain channel exclusivity for stations that have been authorized on or prior to October 14, 1993, or for stations that are subsequently authorized based on applications filed with the Commission on or prior to October 14, 1993, by showing that such stations constitute part of a paging system that meets the criteria set forth in paragraph (a) of this section.

(f) Applications for stations will be deemed mutually exclusive if they are filed on the same day for the same frequency and if the grant of both applications would violate the separation standards set forth in paragraph (b) of this section. Where a 929-930 MHz licensee applies to add a station or stations to a system that has previously qualified for exclusivity under paragraph (a) of this section, applicants who are seeking to construct new systems in the same area and whose applications are mutually exclusive with the licensee's application will be deemed ineligible and such applications will be dismissed as unacceptable for filing.

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6. Section 90.496 is added to read as follows:

§ 90.496 Extended implementation schedule.

For applications filed with the Commission after October 14, 1993, a period of up to three years may be authorized for construction and commencement of operations if the proposed system to be constructed qualifies for channel exclusivity under Section 90.495(a), is comprised of more than 30 transmitters, and the applicant submits justification for an extended implementation period.

(a) The justification must include reasons for requiring an extended construction period and a proposed construction schedule (with milestones). The applicant must also provide a construction cost estimate and must certify that within 30 days of the grant of its application, it will either place a sum equal to the estimate in an escrow account or obtain a performance bond payable in that amount. An applicant who proposes to establish an escrow fund or obtain a bond equal to $20,000 for each proposed transmitter and who otherwise meets our slow-growth criteria will be presumed to qualify for an extension. An applicant whose request is based on a cost estimate lower than $20,000 per transmitter will not receive this presumption and must submit an itemized statement demonstrating that the reduced estimate is reasonable.

(b) A licensee who elects to place funds in escrow as provided in paragraph (a) of this section must provide the Commission with the name of the financial institution that holds the escrow account and the account number. A licensee who elects to post a performance bond as provided in paragraph (a) of this section must use a surety company deemed acceptable within the meaning of 31 U.S.C. § 9304 et seq. (see, e.g., Department of the Treasury Fiscal Service, Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and As Acceptable Reinsuring Companies, 57 Fed. Reg. 29356 (1992)), and the bond must name the United States Treasury as beneficiary in the event of the licensee's default. The licensee must provide the Commission with a copy of the performance bond, including all details and conditions.

(c) As construction of the system proceeds, the licensee may draw from the escrow account or reduce the bond amount to reflect costs incurred, except that the amount of any reduction amount may not exceed the originally estimated construction cost of that portion of the system, even if the actual cost was higher. The amount of the reduction is subject to review and modification by the Commission. If the licensee fails to construct all or part of the proposed system within the extended construction period, the escrow balance or the outstanding principal on the bond will be paid to the United States Treasury.

(d) If an extended construction schedule is authorized under this section, channel exclusivity under Section 90.495 will be extended for the duration of the construction period.

(e) Authorizations under this section are conditioned upon the licensee's compliance with the submitted extended implementation schedule. Failure to meet the schedule will result in loss of authorizations for facilities not constructed and loss of exclusivity as provided in Section 90.495(c).

APPENDIX B

Parties Filing Comments In PR Docket No. 93-35

Comments
American Paging
Arch Communications
Atlanta Voice Page
BellSouth
Celpage
ITA
Luczak, Thomas
MAP Mobile Communications
McCaw
Message Center Beepers/Beepage
Metagram
Metrocall
MTel
NABER
PacTel Paging
PageMart
PageNet
Porta-Phone
Radiofone
Telocator

Replies
American Paging
Arch Communications
BellSouth
ITA/CICS
Message Center Beepers/Beepage
Metromedia
MTel
NABER
PacTel Paging
PageMart
PageNet
Radiofone

SEPARATE STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

RE: Channel Exclusivity for Qualified Private Paging Systems at 929-930 Mhz

I support the decision to allow channel exclusivity on private paging frequencies in the 929-930 MHz band. I am particularly supportive of our efforts to encourage competitive frequency coordination alternatives among certified coordinators in this service. I look forward to monitoring the results of this effort by our Private Radio Bureau. I am hopeful that the Bureau will engage in efforts to certify additional coordinators for this service as quickly as possible.

This action also raises the larger issue of whether there should be competitive coordination alternatives for other services in the private radio area. To the extent the Commission has a docket pending, [PR Dkt 88-548] which is reviewing this matter, I am hopeful that we can resolve the issues in that docket in the near term. I believe that the Commission should continue to encourage competitive coordination alternatives in the remaining portions of the private radio spectrum by any certified coordinators. As long as there is a mechanism for ensuring the integrity of the Commission's database, and for updating the databases of various certified competitive coordinators, I believe the Commission should provide more flexible choice for the public in this regard. Advances in technology permit greater competitive choice among frequency coordinators. I believe we should encourage coordinators to evolve in a direction that fully utilizes the capabilities of modern database and communications alternatives.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

FCC 93-493

In the Matter of	)	
	)	
Local Exchange Carriers' Rates,	)	
Terms and Conditions for	)	
Expanded Interconnection for	)	CC Docket No. 93-162
Special Access	)	Phase I

FIRST REPORT AND ORDER

Adopted: November 9, 1993; Released: November 12, 1993

By the Commission:

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I. INTRODUCTION

1. On July 23, 1993, the Common Carrier Bureau (Bureau) released a Designation Order[1] in the above-captioned docket, which sought specific information from the Tier 1 local exchange carriers (LECS) listed in Appendix A[2] regarding the rate levels, rate structures, and numerous terms and conditions in their special access expanded interconnection tariffs. These tariffs were the subject of the Bureau's Suspension Order in CC Docket No. 93-162,[3] which, inter alia, partially suspended the LECs' special access expanded interconnection tariffs pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), initiated an investigation into the lawfulness of these tariffs, imposed an accounting order, rejected patently unlawful terms and conditions and ordered certain tariff revisions.

2. In this Order, we address on an interim basis the LECs'[4] development of overhead loading factors[5] for expanded interconnection services. Based on our review of the LECs' direct cases and accompanying cost support data, we conclude that the LECs have thus far failed to meet their burden of proof under Section 204(a) of demonstrating

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[1] Local Exchange Carriers' Rates, Terms and Conditions for Expanded Interconnection for Special Access, CC Docket No. 93-162, 8 FCC Rcd 6909 (Com.Car.Bur. 1993) (Designation Order).

[2] Appendix A provides the full and abbreviated names of these LECs as used in this Order. GTOC and GSTC are referred to collectively as GTE; United and Centel are referred to collectively as United/Centel.

[3] Local Exchange Carriers' Rates, Terms and Conditions for Expanded Interconnection for Special Access, 8 FCC Rcd 4589 (Com.Car.Bur. 1993), apps. for review pending (Suspension Order). The applications for review filed by NYNEX, US West and SWB will be addressed in a subsequent Order.

[4] We note that although the Designation Order sought information from all Tier 1 LECs, in the instant Order we address only those Tier 1 LECs that were subject to specific disallowances based on their overhead loading levels in the Suspension Order. Accordingly, because the Bureau made no overhead disallowances for Pacific Bell, Lincoln and SNET, we do not include these carriers when we refer to "LECs" in the instant Order. We note that Pacific Bell, Lincoln and SNET submitted information pursuant to the Designation Order, but we do not address their comments in this Order.

[5] An overhead loading factor is the ratio of price to unit direct cost or total revenue to total direct cost. See Suspension Order, 8 FCC Rcd at 4596, n.109.

that their overhead loading amounts are just and reasonable.[6] Thus, based on the current record, we find that the LECs have not demonstrated that their originally filed rates for expanded interconnection are just and reasonable in compliance with the Communications Act, and we therefore find those rates to be unlawful, as set forth below. We find, however, that either requiring removal of expanded interconnection service because of the LECs' failure to justify their rates or, alternatively, allowing apparently unreasonably high rates to take effect, would frustrate the competitive goals of our expanded interconnection proceeding. Therefore, we prescribe, on an interim basis, a maximum permissible overhead loading factor for expanded interconnection rates, pending further investigation, after which we expect to determine and, if necessary, prescribe rate levels that are just and reasonable. As discussed, infra, our interim prescription is subject to a two-way adjustment mechanism that will protect both the customers and the LECs in the event refunds or supplemental payments are warranted at the conclusion of our further investigation. We also make an interim adjustment to Ameritech's Rate Adjustment Factor for its Central Office Build-Out Charge based on Ameritech's Carrier Access Billing System Costs. We reserve all issues designated for investigation for final resolution in a subsequent Order.

II. BACKGROUND

3. On October 19, 1992, this Commission released the Expanded Interconnection Order, CC Docket No. 91-141,[7] which required Tier 1 LECs to file tariffs offering expanded interconnection for special access services to all interested parties.[8] Specifically, the Expanded Interconnection Order required these LECs to permit competitors and users to terminate their own special access transmission facilities at LEC central offices and to interconnect with LEC special access services.[9] Pursuant to the Expanded Interconnection Order, the Tier 1 LECs listed in Appendix A filed tariffs

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[6] Section 204(a)(1) provides, in pertinent part, that "...the burden of proof to show that the new or revised charge, or proposed charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all questions pending before it and decide the same as speedily as possible."

[7] Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369 (1992) (Expanded Interconnection Order), recon., 8 FCC Rcd 127 (1992); pets. for recon. pending, appeal pending sub nom. Bell Atlantic Corp. v. FCC, No. 92-1619 (D.C. Cir., filed Nov. 25, 1992).

[8] Expanded Interconnection Order, 7 FCC Rcd at 7372; 7398. The Expanded Interconnection Order excluded NECA pool members from this filing requirement. This effectively excluded only Puerto Rico Telephone Company, which is the only Tier 1 LEC that is also a NECA pool member. Id. at 7398.

[9] Id. at 7372. The Expanded Interconnection Order mandated interconnection through the provision of physical collocation, except in limited instances upon commission approval, and virtual collocation where physical collocation is not provided and under certain other circumstances.

scheduled to become effective May 16, 1993. These tariffs were subsequently deferred to June 16, 1993.[10]

4. In the Docket 93-162 Suspension Order, released June 9, 1993, the Bureau took action regarding the rates, and several terms and conditions in the LECs' expanded interconnection tariffs. Based on its finding that the tariffs raised significant questions of lawfulness, the Bureau suspended rates in their entirety for one day, and, as discussed infra, partially suspended the rates for the remainder of the five-month suspension period.[11] The Bureau found, inter alia, that rate levels were influenced significantly by the LECs' choice of overhead factors, none of which was adequately justified as required by the Commission's Expanded Interconnection Order. The Expanded Interconnection Order cautioned LECs that if they chose to reflect fully distributed cost (FDC) overhead loadings in their expanded interconnection rates, the Commission would compare such loadings to the overhead loadings used for other services and require justification for any differences.[12] The Bureau compared the LECs' overhead factors to overhead factors derived from 1992 special access Automated Reporting Management Information System (ARMIS) data. That comparison revealed that all LECs used overhead factors that either approximated or exceeded the ARMIS FDC level for the special access category as a whole.[13]

5. The Bureau noted that although many LECs claimed their overhead factors for expanded interconnection rates were derived from various types of special access cost data, virtually none provided any information regarding loadings for special access services, such as DS1 and DS3 services, much less demonstrated comparability or justification for noncomparability with special access services.[14] Given the LECs' failure to justify their proposed overhead loadings, the Bureau concluded that ARMIS FDC overhead levels represented the "best currently available verifiable surrogate."[15]

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[10] See e.g. Letter from Gregory J. Vogt, Chief, Tariff Division to Southwestern Bell Telephone Co., Special Permission No. 93-384 (May 14, 1993).

[11] Suspension Order, 8 FCC Rcd at 4591.

[12] Expanded Interconnection Order, 7 FCC Rcd at 7429.

[13] Suspension Order, 8 FCC Rcd at 4597.

[14] Id. In many cases, LECs failed to provide sufficient cost data to determine the overhead factor for a particular rate, or did not comply with the requirements of the Commission's Part 69 ONA Order. Amendment of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, Policy and Rules Concerning Rates for Dominant Carriers, 7 FCC Rcd 5235 (1992) (Part 69 ONA Order). Moreover, the Bureau stated, most LECs varied their expanded interconnection overhead factors from rate to rate and did so without explanation, contrary to the requirements of both the Expanded Interconnection Order and the Part 69 ONA Order. Suspension Order, 8 FCC Rcd at 4597.

[15] Suspension Order, 8 FCC Rcd at 4597.

6. The Bureau then calculated special access overhead loading ratios for each LEC using each LEC's own 1992 ARMIS special access cost data, adjusted to eliminate double-counting of overhead costs. The Bureau believed some double-counting occurred because the LECs established rate elements for expanded interconnection specifically to recover costs that would ordinarily be included as FDC overheads on all rates. For example, cage construction and space charges recover land and building costs, a substantial component of general support facilities (GSF); while electric power charges, service ordering and application fees, and certain nonrecurring charges for expanded interconnection recover substantial portions of network operations expenses. Thus, the Bureau reasoned, LECs appeared to be double-recovering these overhead costs, first through stand-alone rate elements and second through overhead loading factors. Accordingly, the Bureau partially suspended the rates to the extent they included, without adequate explanation, overhead loadings that exceeded ARMIS FDC levels for special access services less double-counting.[16] The Bureau also ordered the LECs to adjust their overhead loadings downward to reflect the reallocation of GSF costs from the special access category to the common line category as required by the GSF Order.[17]

7. To aid in resolving issues identified in the Suspension Order, as well as additional issues with respect to expanded interconnection rates, the Designation Order directed the LECs to provide specific cost support data delineated in the Tariff Review Plan (TRP) that accompanied the Designation Order.[18] In order to evaluate the reasonableness of overhead loading amounts, the Bureau requested that the LECs explain the derivation of overhead loading factors for expanded interconnection service, as well as for comparable services. Specifically, the Bureau required the LECs to provide the overhead amounts or overhead factors used to develop each rate element of expanded interconnection service, to explain the basis for these factors, and to demonstrate how they were derived. LECs were asked to justify any "rounding" of costs in the filed rates, and to provide sources used to compute overhead ratios. To the extent that overheads varied among expanded interconnection rate elements, LECs were asked to explain why.

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[16] To determine whether the LECs' rates exceeded FDC levels less double-counting, the Bureau compared the adjusted ARMIS overhead factor for each LEC to the LEC's expanded interconnection overhead factor for each of its rates. The Bureau then calculated a rate adjustment factor (RAF) to adjust downward the LEC's rates to the extent they reflected an overhead factor higher than the ARMIS factor. Suspension Order, 8 FCC Rcd at 4597; see also Appendix C to Suspension Order (listing the RAFs for each company, as well as calculations supporting these RAFS).

[17] Amendment of the Part 69 Allocation of General Support Facility Costs, 8 FCC Rcd 3697 (1983) (GSF Order). In addition, the Bureau identified four cases in which LECs miscomputed their direct costs, resulting in a double recovery of certain costs. Accordingly, the Bureau ordered specific direct cost disallowances for BellSouth, GTE, United/Centel and Bell Atlantic. Suspension Order, 8 FCC Rcd at 4598, 4599. The Bureau also dealt with concerns raised by the parties regarding a number of terms and conditions. Id. at 4600-06.

[18] See Designation Order, 8 FCC Rcd at 6911-15. For TRP purposes, the Bureau, inter alia, required each LEC to categorize its rate elements into specific functions and provide itemized cost information documenting all investments, expenses and taxes listed in each TRP chart.

In addition, LECs were required to provide overhead factors for all DS1 and DS3 services they offer, including generic DS1 and DS3 services, discounted volume and term services and specialized services. LECs were also asked to explain the basis for any difference in overheads among the various DS1 and DS3 services, and between DS1 and DS3 services on the one hand and expanded interconnection services on the other. The Order required LECs to explain to what extent their expanded interconnection overhead costs were adjusted to prevent double-recovery of overheads by expanded interconnection rate elements. Further, since the Bureau believed that some LECs, such as SWB, appeared to use "closure factors"[19] to compute overhead amounts included in expanded interconnection rates, these LECs were required to explain how the use of closure factors results in reasonable estimates of overhead costs for expanded interconnection.[20]

8. The Bureau also directed the LECs to provide "price outs" to gauge the overall service cost of a sample interconnection, and asked the LECs to supply further information concerning the costs included in individual rate elements.[21] Finally, the Bureau sought comment on specific issues relating to rate structure and terms and conditions.[22] Pursuant to the Designation Order, all Tier 1 LECs subject to this Order filed direct cases, accompanied by TRP data. Seven oppositions were filed; Rochester did not file a rebuttal.[23]

III. SUMMARY OF PLEADINGS -- OVERHEAD LOADING FACTORS

A. The Direct Cases

1. Development of Overhead Factors for Expanded Interconnection

9. Although the Bureau's Designation Order specifically directed the LECs to explain the development of their overhead loading factors for expanded interconnection, Rochester does not address the issue and US West refers to the justification it provided

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[19] Closure factors are ratios of revenue to prospective direct costs, i.e., current costs of depreciation, return, taxes and maintenance, for a particular category of service, such as special access, and are applied to the direct costs of a new service (e.g., expanded interconnection) to determine rates.

[20] Designation Order, 8 FCC Rcd at 6913.

[21] Id. at 6913-15.

[22] Id. at 6915-27.

[23] Those parties that filed oppositions are listed in Appendix B. US West filed its rebuttal one day late, concurrently with a motion to accept a late-filed pleading. US West asserts that computer problems prevented it from filing on time. No party opposed US West's motion. We find that US West has shown good cause for its late-filed pleading. Accordingly, we grant US West's motion and accept its rebuttal.

in its original filing.[24] Those LECs that explain the development of their overhead loading factors use very different terminology. SWB, which refers to its overhead factor as a "closure factor," developed its overhead loading factors for expanded interconnection based solely on overhead loadings for DS1 and DS3 services.[25] According to SWB, its closure factor is the result of rate minus incremental cost, or revenues minus the sum of direct cost or "incremental unit cost," as opposed to embedded cost as reflected in ARMIS data. SWB asserts that since costs represent the "total direct cost" of providing the unit of service (excluding common and joint costs), the difference between the revenues and costs is overhead.[26] SWB alleges that it divided total revenues by total direct costs to arrive at an overhead loading factor that reflects the amount of overhead contained in the revenues derived from the services.[27]

10. The other LECs allege that they compute their overhead loading factors for expanded interconnection based on the special access category as a whole. Further, some of these LECs assert that they relied on ARMIS or other historical data in developing their overhead loading factors. Ameritech states that it divided the revenue requirement by the direct costs for all services within a service category to arrive at an "overhead/closure factor" of 1.58 that represents the joint and common costs or overheads for the special access service category.[28] Ameritech also contends that its Carrier Access Billing System (CABS) costs were not properly reflected in the Bureau's development of one of Ameritech's Rate Adjustment Factors in the Suspension Order. According to Ameritech, the Bureau overstated the rate adjustment and did not allow for recovery of CABS costs.[29]

11. CBT asserts that it applied a distributive ratio of 1.35 (the same as the ratio developed for its 1993 Annual Access Filing) to each unit cost to arrive at recurring rate elements for expanded interconnection.[30] BellSouth states that its overheads are the "fully assigned maintenance and administrative expenses" associated with expanded interconnection offerings.[31]

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[24] US West Direct Case at 35-37.

[25] SWB Direct Case, Appendix 4 at 1.

[26] SWB Direct Case at 5-6.

[27] Id., Appendix 4 at 2.

[28] Ameritech Direct Case at 11-12. Ameritech determines the revenue requirement for special access by restating its 1991 costs from ARMIS data at an 11.25 percent rate of return.

[29] Id. at 11; see also Ameritech Rebuttal at 8.

[30] CBT Direct Case at 6.

[31] BellSouth Direct Case, Exhibit 2 at 29, 32.

12. United/Centel explains that its overhead amounts are based on a Part 69 process whereby overhead expense amounts are divided by embedded direct investment amounts.[32] Bell Atlantic asserts that it arrived at its ARMIS-based overhead factor of 1.6845 by dividing revenue requirement by investment,[33] and then applied that factor uniformly to the direct unit costs for each recurring interconnection rate element.[34] NYNEX developed carrying charge factors (CCF) on an annual basis from the ARMIS reports to develop both its direct costs and its overhead costs. NYNEX discloses that overhead represents 33% of the Fully Distributed CCF.[35] GTE asserts that all of its overhead factors were taken directly from its 1992 Annual Charge Factor Studies.[36] Nevada Bell explains that its uniform factor of 1.2707 was calculated by determining the ratio of total corporate overhead to total expenses less overhead.[37] In response to the Bureau's request, a number of LECs describe how they rounded costs included in their expanded interconnection rates.[38]

2. Data Regarding Comparable Special Access Services

13. Despite the Bureau's request in its Designation Order, a number of LECs do not provide overhead loading factors for DS1 and/or DS3 services. Neither Rochester nor CBT discuss their overhead loading factors for comparable services. United/Centel explains that its overheads for generic DS1 and DS3 services have been provided as part of its Annual Access Tariff Filings, but does not report the overhead ratios.[39]

14. Those LECs that supply data regarding comparable services do so in varying levels of detail. SWB reports an overhead loading factor for its DS1 term options and DS3 term and volume options.[40] Ameritech provides "ratios of rate to cost" for each DS1 and DS3 service, but argues that these ratios do not reflect overhead loadings, but only the difference between rate and costs established through price cap regulation.[41] BellSouth

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[32] United/Centel Direct Case at 4.

[33] Bell Atlantic Direct Case, Attachment B, Exhibit 9.

[34] Id., Attachment B at 16-17.

[35] NYNEX Direct Case, Appendix A at 14-16.

[36] GTE Direct Case at 8.

[37] Nevada Bell Direct Case at 3-4.

[38] See BellSouth Direct Case, Exhibit 2 at 37; Bell Atlantic Direct Case, Attachment B at 16-17; NYNEX Direct Case, Appendix A at 14; GTE Direct Case at 8.

[39] United/Centel Direct Case at 4-5.

[40] SWB Direct Case at 8; see Appendix 4.

[41] See Ameritech Direct Case at 10.

provides "price-ceiling" ratios for its existing DS1 and DS3 services.[42] Nevada Bell indicates that it used an overhead factor of 1.1709 to calculate its initial DS3 rate, but does not provide information on its current DS1 rates.[43] NYNEX supplies overhead factors only for the channel termination elements of its DS1 and DS3 services.[44] GTE provides a ratio of the current tariffed rate as compared to the unit direct cost for its existing DS1 and DS3 services, but states that it was unable to provide overheads for all rate elements due to time constraints.[45] Although US West objects to the Bureau's request, it provides data on generic DS1 and DS3 services (which include term discounts).[46] Bell Atlantic supplies information on overhead loadings for its DS1 and DS3 services.[47]

15. A number of LECs insist that the Bureau should not have asked them to compare overhead loadings for DS1 and DS3 services with overhead loadings for expanded interconnection services because the former were established under rate of return regulation and modified pursuant to the price cap rules.[48] GTE considers it inappropriate to compare overheads for "competitive" DS1 and DS3 services with overheads for "noncompetitive" services like expanded interconnection.[49] US West dislikes comparing existing mature services with expanded interconnection services on the basis of an overhead factor because of the differences in overhead loadings reflected in ARMIS data at the time services are filed.[50] Those LECs that provide overhead comparisons argue summarily that their overhead loadings for expanded interconnection

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[42] BellSouth Direct Case, Exhibit 2, Appendix E. In its rebuttal, BellSouth explains that it included information only on term plans for DS3 services because it was about to revise its DS1 term rates. As an attachment to its rebuttal, BellSouth submits overhead ratios for both DS1 and DS3 services. BellSouth Rebuttal at 5-6, n.8.

[43] Nevada Bell Direct Case at 4-5.

[44] NYNEX Direct Case, Appendix A at 16 & Attachment J.

[45] GTE Direct Case at 8.

[46] US West Direct Case at 38-39.

[47] Bell Atlantic Direct Case, Attachment B at 16-17; see Exhibit 10.

[48] See e.g., Ameritech Direct Case at 10; GTE Direct Case at 8.

[49] GTE Direct Case at 9.

[50] US West Direct Case at 38.

are reasonable because, for the most part, they are identical to,[51] similar to,[52] or lower than[53] overhead ratios for DS1 and DS3 services.

3. Adjustments to Prevent Double-Recovery of Overheads

16. Several LECs oppose the Bureau's adjustments to ARMIS FDC overhead levels to prevent double-recovery of overheads by expanded interconnection rate elements.[54] Bell Atlantic, for example, asserts that the Bureau erroneously determined that Bell Atlantic's rates "double-recovered" separate overhead cost rate elements that would ordinarily be included to recover fully distributed cost overheads on all rates.[55] SWB adds that any portion of the direct costs associated with its collocation elements that are disallowed must also be removed from DS1 and DS3 underlying costs so that the overhead loading factor can be recomputed.[56] US West claims that its long run incremental cost methodology ensures that there is no double recovery of overheads.[57]

B. Oppositions to Direct Cases

1. Adequacy of LECs' Submissions

17. Generally, those parties that oppose the direct cases argue that the LECs have failed to provide essential data in compliance with the Bureau's Designation Order. ALTS asserts that as a result of the LECs' failure to provide necessary information first in their original tariff filings and again in their direct cases, key elements of the expanded interconnection tariffs remain unjustified.[58] Further, ALTS maintains that since the LECs' expanded interconnection tariffs are not really "carrier initiated," they must be evaluated

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[51] See CBT Direct Case at 6.

[52] See e.g., GTE Direct Case at 9; NYNEX Direct Case, Appendix A at 15; US West Direct Case at 39. US West states that its overhead loading factor for expanded interconnection is similar to factors for generic month to month DS1 and DS3 services. US West contends that because it fashioned expanded interconnection service as a month to month service with no extended term obligations, the only relevant loading factors among the generic DS1 and DS3 services are those pertaining to month to month service.

[53] See e.g., Bell Atlantic Direct Case, Attachment B at 16-17 & Exhibit 10; BellSouth Direct Case, Exhibit 2 at 34.

[54] See Suspension Order, 8 FCC Rcd at 4597; Bell Atlantic Direct Case, Introduction at 2; BellSouth Direct Case, Exhibit 2 at 34-36; GTE Direct Case at 9-10; NYNEX Direct Case, Appendix A at 15; Nevada Bell Direct Case at 5-6.

[55] Bell Atlantic Direct Case, Introduction at 2.

[56] SWB Direct Case at 7; see Appendix 4 at 2.

[57] US West Direct Case at 37.

[58] ALTS Opposition at i.

under a standard of review different from that used for other proceedings where a carrier files a tariff for a service it wants to offer.[59]

18. Sprint argues that since the LECs have failed to carry their burden of proof in justifying their high charges, the Commission has the right to prescribe rates on the information before it. Further, Sprint contends, if the Commission does not have an adequate record before it, it should identify carriers whose costs are above average and give them the opportunity to justify their proposed cost levels so that the Commission may prescribe lawful rates.[60] MCI asserts that the LECs' lack of uniformity on rates has "muddled" the process of determining reasonable rates for collocation.[61]

19. TCG contends that rather than providing meaningful additional cost information as required by the Designation Order, the LECs have simply "repackaged" the existing cost information already deemed inadequate by the Bureau.[62] TDL asserts that since the LECs have effectively delayed the implementation of interconnection and collocation through filing unreasonable tariffs, the Commission should require that they bear the costs of their conduct as a matter of fairness and as a deterrent to future improper filings.[63]

2. Oppositions to LEC Data

20. ALTS and Ohio PUC object to the LECs' use of closure factors in determining overheads for expanded interconnection services.[64] ALTS also complains that the information provided by LECs such as Ameritech, US West and GTE fails to satisfy the Bureau's request for overhead factors for DS1 and DS3 services. According to ALTS, Ameritech failed to explain how its costs for DS1 and DS3 services were determined. ALTS argues that US West's information regarding its generic DS1 and DS3 services is insufficient, and that GTE did not provide an adequate explanation of its overhead factors for DS1 and DS3 services.[65]

21. Further, ALTS claims that the LECs' direct cases fail to establish that the LECs have used overhead loadings for collocation services that do not exceed those used

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[59] Id. at 3.

[60] Sprint Opposition at 4-5.

[61] MCI Opposition at 2.

[62] TCG Opposition at 1.

[63] TDL Opposition at 2-3.

[64] ALTS Opposition at 17; Ohio PUC Opposition at 10.

[65] ALTS Opposition at 9-10.

in their DS1 and DS3 services facing competition.[66] ALTS and TDL[67] disagree with US West and Ameritech that it is inappropriate to compare overhead loadings for expanded interconnection services with those for DS1 and DS3 services.[68] ALTS insists that the appropriate LEC rates to consider for purposes of comparability are DS1 and DS3 term and volume discount rates because these are the rates with which competitive access providers will have to compete when they collocate. Further, ALTS argues, LECs such as Bell Atlantic and BellSouth have manipulated the overhead data to obscure the fact that they have not applied the same loading arrangements for their DS1 and DS3 services and collocation services.[69] TDL complains that US West is earning a significant profit on expanded interconnection services.[70]

22. ALTS argues that Bell Atlantic, US West, SWB and NYNEX have failed to establish that their overhead factors for expanded interconnection are fully consistent with those used to develop DS1 and DS3 rates. According to ALTS, these LECs want the Commission to deem it reasonable for them to recover higher overheads in the costs of expanded interconnection service.[71]

C. LEC Rebuttals

23. Ameritech defends the reasonableness of its closure factor and contends that its expanded interconnection services are priced based on a reasonable share of the overheads, even though Ameritech cannot demonstrate that current DS1 and DS3 services bear exactly the same overheads.[72] In reply to ALTS, US West maintains that it provided aggregated overhead loadings for DS1 and DS3 month-to-month and term rates.[73]

24. BellSouth responds that ALTS misunderstands its method of establishing overheads, and asserts that it has provided sufficient information to establish that overhead loadings reflected in its competitive DS1 and DS3 services exceed the loading factors used to compute its expanded interconnection charges.[74] GTE also maintains that it provided an adequate explanation of its DS1 and DS3 overhead factors, which vary

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[66] Id. at 17.

[67] TDL Opposition at 16. TDL confines its comments to US West's direct case.

[68] ALTS Opposition at 9-10.

[69] Id. at 19-21.

[70] TDL Opposition at 8.

[71] ALTS Opposition at 18-20.

[72] Ameritech Rebuttal at 2.

[73] US West Rebuttal at 23-24 (citing US West Direct Case at 39).

[74] BellSouth Rebuttal at 6.

from service to service and state to state. GTE observes that some overheads for DS1 and DS3 services are higher than those for expanded interconnection and some are lower, but contends that a comparison shows that its expanded interconnection overheads are reasonable.[75] In response to ALTS, SWB claims that it provided documentation to explain how it was reasonable for SWB to apply a DS1-specific overhead factor to DS1-specific interconnection elements, a DS3-specific factor to DS3-specific interconnection elements and a combined DS1/DS3 overhead factor to interconnection elements that could not be defined as DS1-specific or DS3-specific.[76]

IV. DISCUSSION

A. Introduction

25. In the Expanded Interconnection Order, we took a historic step toward removing barriers to competition in the interstate access market by requiring LECs to offer expanded interconnection to all interested parties.[77] We believe that expanded interconnection will foster competition benefiting consumers through increased efficiency and the more rapid deployment of new technologies. To the extent that the LECs' rate levels appeared to frustrate these goals, the Bureau, in its Suspension Order, took action to encourage economically efficient competition.[78]

26. We are now faced with the task of ensuring that expanded interconnection is available at just and reasonable rates. We had hoped that the information on overheads contained in the LECs' direct cases would enable us to assess the reasonableness of the LECs' expanded interconnection rates and to determine whether the proposed overhead loading factors, which are a substantial component of the rates, are just and reasonable. The record, however, is still substantially deficient. The LECs have not, to date, presented us with persuasive overhead cost showings that include sufficient detail and explanation to justify their proposed overhead loading factors.[79] The LECs have now been given two opportunities to justify the overhead loadings reflected in their expanded interconnection rates, and have failed to do so. Accordingly, based on the current record, we must find the LECs' rates for expanded interconnection unjust and unreasonable, and therefore unlawful.

27. We cannot, however, allow the LECs' failure to provide adequate data and explanation to thwart our effort to ensure that expanded interconnection is available at just and reasonable rates. Thus, in order to advance the Commission's goals, we impose an

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[75] GTE Rebuttal at 4.

[76] SWB Rebuttal at 16 (citing ALTS Opposition at 17-18; 20).

[77] Expanded Interconnection Order, 7 FCC Rcd at 7372.

[78] Suspension Order, 8 FCC Rcd at 4597.

[79] We note that during the pendency of our further investigation, we expect that the Bureau staff will obtain data from the LECs that are responsive to the Designation Order.

interim prescription setting forth the maximum permissible overhead loading factor for expanded interconnection services pending further investigation. This interim prescription will remain in place only until the final resolution of this further investigation, when we intend to make a final determination as to what level of overhead is just and reasonable for expanded interconnection services. This interim prescription is subject to a two-way adjustment mechanism, as described below.

B. The Direct Cases

1. Overall Evaluation

28. In the Designation Order, the Bureau provided the LECs with another opportunity to justify their overhead factors for expanded interconnection by explaining how these factors were derived, and by providing information on comparable services, accompanied by supporting cost data. The LECs, however, have failed to provide sufficient information in their direct cases to justify their proposed overhead loading factors. As explained below, the LECs either failed to respond to the Bureau's requests for data or provided incomplete data.

29. The Designation Order specifically directed the LECs to explain how they developed their overhead loading factors for each rate element of expanded interconnection service. Neither Rochester nor US West, however, describe their methodology in their direct cases. SWB attempts to justify its overhead factor for expanded interconnection based solely on its overhead factors for DS1 and DS3 services.[80] The other LECs claim to have computed their overhead factors for expanded interconnection based on FDC studies of the special access category as a whole.[81] In addition, a number of the LECs basing their factors on FDC studies of the special access category as a whole maintain that they relied on ARMIS data.[82]

30. With the exception of SWB, the LECs essentially claim to use the same method the Bureau adopted in its Suspension Order to calculate ARMIS-based overhead factors, i.e., they use data for the special access category as a whole. However, in most cases their overhead factors for expanded interconnection exceed, without explanation, those calculated by the Bureau in the Suspension Order.[83] Although we do not require

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[80] See SWB Direct Case, Appendix 4 at 1.

[81] See e.g., Ameritech Direct Case at 11-12 & Appendix D; United/Centel Direct Case at 4.

[82] See e.g., Bell Atlantic Direct Case, Attachment B at 16-17 & Exhibit 9; NYNEX Direct Case, Appendix A at 14.

[83] We note, however, that the overhead loading factors for expanded interconnection services calculated by Pacific Bell, Lincoln, SNET and a number of the GTE Telephone Operating Companies and United/Centel Companies in their original tariff filings did not exceed ARMIS FDC overhead levels less double-counting. Accordingly, the Bureau made no overhead

the LECs to use an ARMIS-based calculation to justify their overhead loadings, we are concerned that the LECs have neither demonstrated why their overhead factors differ from factors the Bureau calculated using publicly available ARMIS data adjusted for double-counting,[84] nor convinced us that the Bureau erroneously calculated the ARMIS overhead factors.[85] Therefore, we find that the LECs have not justified, at this point in the investigation, their calculations of FDC overhead factors for expanded interconnection service to the extent that they exceed, without explanation, the upper limits for overhead loading factors calculated by the Bureau.

31. In addition, the Designation Order instructed the LECs to provide overhead loading factors for all DS1 and DS3 services they offer, and to explain the basis for any differences in overheads between those DS1 and DS3 services and their expanded interconnection services.[86] Despite this directive, CBT, Rochester and United/Centel do not report specific DS1 and DS3 overhead loading factors in their direct cases. As noted above, the LECs that provide DS1 and DS3 data argue that their overhead loading factors for expanded interconnection are reasonable because these factors are identical to,[87]

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disallowances for these companies in the Suspension Order. Likewise, these LECs' rates are not subject to the interim prescription imposed in this Order.

[84] As discussed supra, the Bureau determined it was necessary to adjust FDC overheads to eliminate double-counting of costs that were already being recovered through specific charges. See Suspension Order, 8 FCC Rcd at 4597.

[85] However, as discussed in IV.B.3., infra, we do make an interim adjustment to one of Ameritech's RAFs. Our analysis of Ameritech's direct case reveals that the Bureau's computation of the overhead factor reflected in Ameritech's Central Office Build-Out Charge may not have accounted properly for Ameritech's Carrier Access Billing System costs. Thus, Ameritech's RAF during the interim period is lower than it was during the five-month suspension period.

[86] Designation Order, 8 FCC Rcd at 6913.

[87] See CBT Direct Case at 6.

similar to,[88] or lower than[89] their overhead loading factors for DS1 and DS3 services in most instances.[90]

32. We are not persuaded by the LECs' arguments, and we question the basis on which they computed their overhead loading factors for DS1 and DS3 services. First, the LECs ask us to find their expanded interconnection overheads reasonable because, for the most part, they are equal to, similar to, or lower than overheads for DS1 and DS3 services. However, contrary to the requirements of the Designation Order, the LECs fail to explain the relationship between their expanded interconnection overheads and their DS1 and DS3 overheads.[91] Moreover, the LECs fail to provide data to support the comparison. Second, the Designation Order specifically instructed the LECs to provide information used to compute any overhead ratios.[92] Nevertheless, those LECs relying on a comparison with DS1 and DS3 overhead loading factors to justify their overhead loading factors for expanded interconnection do not adequately explain how they determined the direct costs or overhead amounts used in calculating their DS1 and DS3 overhead loading factors.[93]

33. The Designation Order also required those LECs using closure factors, or ratios of revenue to prospective direct costs, to explain how the use of these factors results in reasonable estimates of overhead costs for expanded interconnection.[94] The

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[88] See e.g., GTE Direct Case at 8-9; NYNEX Direct Case, Appendix A at 15; US West Direct Case at 39.

[89] See e.g., Bell Atlantic Direct Case, Attachment B at 16-17 & Exhibit 10; BellSouth Direct Case, Exhibit 2 at 34.

[90] With respect to the LECs' arguments that the Bureau should not have sought information needed to compare overhead loadings for expanded interconnection services with those for comparable special access services, the Expanded Interconnection Order had specifically cautioned LECs that if they chose to reflect FDC overhead loadings in their rates, the Commission would compare such loadings to the overhead loadings used for other services and require justification for any differences. Expanded Interconnection Order, 7 FCC Rcd at 7429. Accordingly, the Bureau acted in accordance with our Order.

[91] For example, some LECs show expanded interconnection overhead factors based on the special access category as a whole that are lower than those for DS1 and DS3 services, but do not explain why their overhead factors for special access overall are lower than those for DS1 and DS3 services. The special access category as a whole includes not only DS1 and DS3, but also voice grade and other special access services that are less competitive and logically likely to have higher, not lower, overhead loadings than DS1 and DS3 services. No explanation of why overhead factors for DS1 and DS3 services exceed an overhead factor for the entire special access category appears in the direct cases.

[92] Designation Order, 8 FCC Rcd at 6913.

[93] See e.g., US West Direct Case at 39.

[94] Designation Order, 8 FCC Rcd at 6913.

LECs that attempt to justify their expanded interconnection overhead factors based on comparisons with closure factors for DS1 and DS3 services, such as SWB, fail to provide sufficient data to explain how they estimated prospective direct costs for these services. Nor do these LECs provide data that would permit the Commission to determine whether a method involving closure factors, as opposed to the Bureau's ARMIS-based method, which calculates overhead factors based on historical costs, produces reasonable rates for expanded interconnection service.

34. In view of the numerous deficiencies in the LECs' direct cases, we find that the LECs have thus far justified neither their overhead loading factors nor their comparisons based on closure factors using prospective costs. Based on the current record, the LECs have failed to meet their burden of proof under Section 204(a) of justifying their proposed overhead loadings for expanded interconnection services. Although our Orders permit LECs to use any reasonable level of overheads, the current levels have not been justified as reasonable. Accordingly, based on the current record, we must find the LECs' originally filed rates for expanded interconnection to be unlawful.

2. Interim Prescription

35. Although we find the LECs' rates to be insufficiently justified -- and thus unlawful -- on the current record, we also lack sufficient information to make a permanent rate prescription. However, we believe that the public interest requires that we take immediate steps to ensure that rate levels based on a verifiable and reasonable overhead loading factor are in place pending further investigation of the LECs' special access expanded interconnection tariffs. Otherwise, the Commission's expanded interconnection policies, designed to open the interstate special access market to greater competition, would be thwarted by the LECs' failure to provide the Commission with adequate information justifying their proposed overhead loading factors. Simply ordering the removal of expanded interconnection service for lack of lawful rates would deny customers the benefit of expanded interconnection. Similarly, the alternative course of simply allowing rates to return to their originally filed levels pending further investigation would strongly discourage customers from taking expanded interconnection service given that some of the LECs' overhead recovery reflected in their originally filed rates appears excessive. The benefits that we anticipated in mandating expanded interconnection -- expanded service choices, heightened incentives for efficiency, more rapid technological innovation, and increased pressure to charge cost-based prices -- would be delayed. In addition, allowing excessive rates to take effect pending further investigation could impede competitors' ability to raise capital for interconnection ventures. For this reason, we believe that ensuring rate stability pending conclusion of this proceeding is important to achieving the Commission's public interest goals in the expanded interconnection proceeding.

36. Therefore, in light of the current record, we believe that the ARMIS-based FDC overhead levels used by the Bureau in the Suspension Order continue to represent the best currently available, verifiable and reasonable surrogate for the upper limits of overhead loading factors for expanded interconnection for the interim period until the

tariff investigation is concluded.[95] We emphasize, however, that we are not finding that ARMIS FDC overhead levels are the only verifiable and reasonable upper limits for overhead loading levels for expanded interconnection service, or even the ideal upper limits for overhead loading levels for this service. We will continue to examine this issue during the pendency of our further investigation.

37. Accordingly, pursuant to our authority under Section 4(i) of the Communications Act, 47 U.S.C. § 154(i),[96] and ancillary to our authority under Sections 201 and 205 of the Communications Act, 47 U.S.C. §§ 201 and 205, to require interconnection at just and reasonable rates, and to prescribe lawful rates, we prescribe on an interim basis the maximum permissible overhead loading factor for the LECs' expanded interconnection rates. The maximum permissible expanded interconnection rates for the interim period pending conclusion of the tariff investigation shall be computed as follows. Appendix C to this Order sets forth Rate Adjustment Factors (RAFs) for each LEC, and for each rate element subject to the interim prescription of a maximum permissible overhead loading factor. These RAFS, when multiplied by the originally filed rate level for each rate element, will result in rates that reflect ARMIS FDC levels, less double-counting of overhead costs, and adjusted to reflect the reallocation of GSF costs. LECs are required to multiply their rates filed on February 16, 1993 by the RAFs in Appendix C to determine the maximum permissible rate levels during the interim period.

38. Our interim prescription does not address issues other than the LECs' justification of their proposed overhead loading factors. On an interim basis, we find it necessary to focus on overhead loading factors because the level of expanded interconnection rates is influenced significantly by overhead loadings. Further, an interim prescription regarding overhead levels will ensure rate stability and thus further the goals of the expanded interconnection proceeding. We emphasize that our prescription is for an interim period only and in no way limits or prejudges any action we may take in our final order concluding this investigation. We note that certain LECs' rates were subject

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[95] We note that the Bureau removed from its ARMIS-based overhead factors the portion of overheads that is recovered in specific charges for expanded interconnection (i.e., double-counted overheads). We believe that such practice is reasonable and therefore retain this adjustment to the upper limits for the overhead factors to eliminate double-counting of costs during this interim period. We will continue to examine the treatment of double-counting during the pendency of our investigation. In addition, we note that the Bureau's Suspension Order required the LECs to adjust their overhead loadings to reflect the decreased allocation to special access of GSF costs arising from our GSF Order. None of the LECs objected to this directive, and our review of the direct cases indicates that, except for some rounding differences, all LECs made appropriate adjustments. Accordingly, the Bureau's adjustments to reflect the GSF reallocation will remain in place during the interim period. We note that the interim prescription described below takes into account adjustments both to eliminate double-counting of overheads and to reflect the GSF decrease.

[96] Section 154(i) gives the Commission authority to "issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."

to direct cost disallowances pursuant to the Suspension Order,[97] and thus, these LECs' current rates may be lower than the maximum permissible rate levels for the interim period. These carriers may file rates reflecting our RAFs at the end of the suspension period.[98]

39. Further, our interim prescription is subject to adjustment in either direction at the conclusion of our further investigation. We hereby establish a two-way adjustment mechanism that will protect both carriers and customers until we finally prescribe or determine just and reasonable rates for expanded interconnection service. Accordingly, we will provide an opportunity for carrier recoupment if, at the conclusion of our investigation, we determine that the interim rates are below a just and reasonable level. As a result, the legitimate interests of the LECs will not be harmed by our interim prescription. Conversely, our arrangement will provide an opportunity for interconnectors to receive refunds if we later conclude that interim rates are above the just and reasonable level.[99] In this way, neither the customers nor the LECs will be harmed in the final analysis by the interim charges.

40. We find support for our action in the Lincoln Telephone decision,[100] which also presented us with the challenge of ensuring prompt compliance with Commission policy concerning interconnection in the absence of rates that have been found to be just and reasonable. In Lincoln Telephone, the Commission instituted a policy imposing on Lincoln Telephone & Telegraph Company (Lincoln), as on other telephone companies with monopoly local exchange facilities, an immediate legal obligation to furnish interconnection facilities to MCI Telecommunications Corporation (MCI). Until we could determine just and reasonable rates for interconnection, we required Lincoln to bill and collect the charges set forth in the tariff filed by the Bell System Operating Companies

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[97] See Suspension Order, 8 FCC Rcd at 4599. These LECs are BellSouth, GTE, United/Centel and Bell Atlantic.

[98] Further, those carriers that voluntarily reduced their rates during the suspension period shall calculate new rates pursuant to the RAFs set forth in Appendix C to this Order. To the extent that their voluntarily reduced rates already reflect the changes ordered herein, these carriers need not refile. On July 14, 1993, SWB filed Transmittal No. 2285 to create a new "DC Transmission Power, 40 AMPS" rate element. SWB shall apply the RAF in Appendix C for this rate element to the rate filed in Transmittal No. 2285.

[99] We note that pursuant to the accounting order instituted by the Bureau in its Suspension Order, interconnectors may also receive refunds if we later determine that expanded interconnection rates were above the just and reasonable level during the five-month suspension period.

[100] Lincoln Telephone and Telegraph's Duty to Furnish Interconnection Facilities to MCI Telecommunications Corporation, Declaratory Order, 72 FCC 2d 724 (1979), aff'd, 652 F.2d 136 (D.C. Cir. 1981) (Lincoln Telephone).

pursuant to the ENFIA agreement.[101] Since we were unsure of the exact costs of furnishing interconnection facilities, we established an "interim billing and collection arrangement" pursuant to our authority under Section 4(i) that would be subject to adjustment in either direction, based on our final decision.[102] We reasoned that such action would serve the public interest in immediate interconnection and give adequate protection to both parties, neither of which was bound finally to the interim charges.[103]

41. In 1981, the United States Court of Appeals for the District of Columbia Circuit upheld our authority under Section 4(i) to establish such an interim arrangement, deeming our action a "helpful and necessary step" in implementing our immediate interconnection order.[104] The Court noted that the Commission's "close supervision" of the interconnection process via an interim arrangement was necessary because neither Lincoln nor MCI was a "willing partner" in the provision of interstate services, given the parties' competing interests.[105]

42. In light of the policy goals of the expanded interconnection proceeding, we believe that the mechanism established in Lincoln Telephone and affirmed by the D.C.

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[101] The Exchange Network Facilities for Interstate Access (ENFIA) tariff implemented an agreement signed by AT&T, GTE, MCI and other common carriers (OCC) to set an interim formula for computing OCC access charges pending the establishment of a more permanent, cost-based access charge system.

[102] We explained that if the interim collections were below a just and reasonable level, we could require MCI to make up the difference; if interim collections were above the just and reasonable level, we could require Lincoln to refund the difference to MCI. Lincoln Telephone, 72 FCC 2d at 729.

[103] Id. We note that in Lincoln Telephone, no just and reasonable rates existed at the time of our decision because Lincoln and MCI had failed to agree on rates for interconnection services. We stated that the interim billing and collection arrangement under ENFIA charges would be subject to adjustment either on the basis of an ultimate agreement between the parties that the Commission approved or when the Commission prescribed or determined just and reasonable charges. Id. While we recognize that in Lincoln Telephone, our remedy was not determined in the context of a Section 204(a) proceeding, we do not find this distinction significant. In Lincoln Telephone, as in the instant proceeding, our overriding concern was ensuring the opportunity for immediate interconnection until we could determine just and reasonable rates for the service. An essential aspect of both proceedings is that interim rates established by the Commission to fulfill an important policy objective are accompanied by a two-way adjustment mechanism. Moreover, in the Dark Fiber proceeding, we noted that Section 4(i) could provide the Commission with authority to adopt an interim prescription with a two-way adjustment mechanism in the context of a Section 204(a) proceeding. See In the Matter of Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, 6 FCC Rcd 4776, 4777 (1991) appeal pending sub nom., Southwestern Bell Telephone Co. et al. v. FCC, No. 91-1416 (D.C. Cir., filed Aug. 27, 1991)(Dark Fiber).

[104] Lincoln Telephone, 659 F.2d at 1107.

[105] Id. at 1109.

Circuit is well-suited to protect both carriers and customers as we take steps to open one of the remaining preserves of monopoly telecommunications service -- the interstate special access market -- to competition. As in Lincoln Telephone, the LECs in the instant proceeding may not be willing participants in the provision of expanded interconnection services. Accordingly, as the D.C. Circuit stated when it upheld our decision in Lincoln Telephone, close regulatory supervision of the interconnection process is warranted so that the Commission can ensure implementation of a policy that clearly serves the public interest.[106]

3. Adjustment to Ameritech's RAF for Central Office Build-Out Charge

43. Upon review of the current record, we find it necessary to make an interim adjustment to one of the Rate Adjustment Factors (RAFs) in the Bureau's Suspension Order. In its direct case, Ameritech asserts that its Carrier Access Billing System (CABS) costs were not properly reflected in the development of the RAFs. Accordingly, Ameritech contends that the Bureau overstated the rate adjustment and did not allow for recovery of CABS costs.[107] Our analysis indicates that the overhead factor for Ameritech's Central Office Build-Out charge appears to have been miscomputed. The RAF for Ameritech's Central Office Build-Out Charge set forth in Appendix C of this Order reflects our interim correction.

V. CONCLUSION

44. We have reviewed the LECs' direct cases, the oppositions and the rebuttals. In light of the current record, we find that the LECs have not justified their proposed overhead loading factors, and that the LECs' originally filed rates are therefore unlawful. As set forth above, we find that our interim prescription of a maximum permissible overhead loading factor, subject to any necessary adjustment and to possible refunds or supplemental payments, is the most reasonable and practical method of promoting the public interest in ensuring that special access expanded interconnection service is available at fair rates pending the final conclusion of our investigation of the LECs' tariffs. In addition, we make an interim adjustment to Ameritech's Rate Adjustment Factor for its Central Office Build-out Charge based on Ameritech's Carrier Access Billing System costs. We emphasize that the interim prescription in this Order in no way limits or prejudges any action we may take in our final order concluding this investigation.

VI. ORDERING CLAUSES

45. Accordingly, **IT IS ORDERED**, pursuant to Sections 204(a) and 201(b) of the Communications Act, 47 U.S.C. §§ 204(a) and 201(b), that the rates for expanded

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[106] See id.

[107] Ameritech Direct Case at 11.

interconnection service filed on February 16, 1993 by the local exchange carriers subject to this Order[108] are unjust and unreasonable, and therefore unlawful.

46. **IT IS FURTHER ORDERED**, pursuant to Sections 4(i), 201 and 205 of the Communications Act, 47 U.S.C. §§ 154(i), 201 and 205, that the maximum permissible special access expanded interconnection rate levels during the interim period from November 15, 1993 to the conclusion of our investigation in CC Docket No. 93-162 for the local exchange carriers shall be determined by applying the Rate Adjustment Factors set forth in Appendix C to this Order to the rates for expanded interconnection service originally filed on February 16, 1993. With respect to Southwestern Bell Telephone Company's "DC Transmission Power, 40 AMPs" rate element, the RAF shall be applied to the rate filed on July 14, 1993, as set forth in paragraph 38 n.98, supra.

47. **IT IS FURTHER ORDERED** that, as set forth in paragraph 43, supra, Ameritech may make an interim adjustment to its Central Office Build-Out Charge by applying the relevant Rate Adjustment Factor as provided in Appendix C to this Order.

48. **IT IS FURTHER ORDERED** that the local exchange carriers must file tariff revisions consistent with this Order no later than November 12, 1993, to be effective on November 15, 1993. For this purpose, Sections 61.56, 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58 and 61.59, **ARE WAIVED** and Special Permission No. 93-979 is assigned.

49. **IT IS FURTHER ORDERED** that the accounting order set forth in the Bureau's Suspension Order shall remain in effect pending resolution of this investigation. Thus, pursuant to Sections 4(i) and 204(a) of the Communications Act, 47 U.S.C. §§ 154(i) and 204(a), the local exchange carriers listed in Appendix A **SHALL KEEP ACCURATE ACCOUNT** of all earnings, costs and returns associated with the rates that are the subject of this investigation, and of all amounts paid thereunder and by whom such amounts are paid. If, at the conclusion of this investigation, the Commission determines that the interim rates pursuant to this Order and/or the rates in effect during the suspension period are above just and reasonable rates for expanded interconnection service, we may require the local exchange carriers to pay refunds to interconnectors for service rendered during the five-month suspension period and/or service rendered between November 15, 1993 and the conclusion of our investigation. If we determine that interim rates pursuant to this Order are below the just and reasonable rates for expanded interconnection service, we may require interconnectors to pay additional charges to the local exchange carriers for service rendered between November 15, 1993 and the conclusion of our investigation.

50. **IT IS FURTHER ORDERED** that the motion to accept late-filed pleading filed by US West Communications, Inc. **IS GRANTED.**

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[108] See footnotes 4 and 83, supra.

51. **IT IS FURTHER ORDERED** that this Order **IS EFFECTIVE** upon release.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

Parties Filing Direct Cases

Ameritech Operating Companies (Ameritech)
Bell Atlantic Telephone Companies (Bell Atlantic)
BellSouth Telecommunications Inc. (BellSouth)
Centel Telephone Company (Centel)o
Cincinnati Bell Telephone Company (CBT)
GTE System Telephone Companies (GSTC)*
GTE Telephone Operating Companies (GTOC)*
Lincoln Telephone and Telegraph Co. (Lincoln)
Nevada Bell
NYNEX Telephone Companies (NYNEX)
Pacific Bell
Rochester Telephone Corporation (Rochester)
Southern New England Telephone Co. (SNET)
Southwestern Bell Telephone Company (SWB)
United Telephone Companies (United)o
US West Communications, Inc. (US West)

* GTOC and GSTC are referred to collectively as GTE.

o United and Centel are referred to collectively as United/Centel.

APPENDIX B

Parties Filing Oppositions

Association for Local Telecommunications Services (ALTS)
MCI Communications Corporation (MCI)
MFS Communications Company, Inc. (MFS)
Public Utilities Commission of Ohio (Ohio PUC)
Sprint Communications Company L.P. (Sprint)
Teleport Communications Group, Inc. (TCG)
Teleport Denver Ltd. (TDL)

APPENDIX C

RATE ADJUSTMENT FACTORS (RAFS)

Summary of Overhead RAFs
Adjusted for Double–Counting and GSF

AMERITECH

EI RATE ELEMENTS		RAF
Physical		
CO FLOOR SPACE RENTAL PER 100 SQ FT		93.30%
CENTRAL OFFICE BUILDOUT	NRC	93.42%
Virtual		
7' EQUIP BAY W/AT&T DDM 1000 FUSE PANEL		92.53%
DS–3 MULDEM (AKM3)		90.43%
90 MBPS CKT PACK TELEMETRY (AKM4)		97.24%
CKT PACK DS1 INTERFACE (AEK368		99.73%
PER MULDEM CONFIG – DS1 INTRFC CAP (AEK368)		99.73%
DS1 CHANNEL PLUG–INS		99.73%
DS–3 MULDEM (AKM3)		90.43%

BELL ATLANTIC

EI RATE ELEMENTS	RAF
CROSS–CONNECT DS1––PHYSICAL & VIRTUAL	59.32%
CROSS–CONNECT DS3––PHYSICAL & VIRTUAL	67.49%
CONNECTION SERVICE DS1––PHYSICAL	65.39%
CONNECTION SERVICE DS3––PHYSICAL	66.11%
CONNECTION SERVICE DS1––VIRTUAL	30.67%
CONNECTION SERVICE DS3––VIRTUAL	28.45%
CABLE SUPPORT––PHYSICAL	72.53%
CABLE SUPPORT––VIRTUAL	67.48%
POWER––DC (AC INCLUDED)	82.19%

BELLSOUTH

EI RATE ELEMENTS	RAF
CROSS–CONNECT DS1	88.01%
CROSS–CONNECT DS3	90.01%
INTERCONNECTION FLOOR SPACE––100 SQ FT	49.03%
OPTIONAL DC POWER––PER MODULE	87.54%
OPTIONAL BACK UP AC POWER ––PER MODULE	87.41%

NYNEX

EI RATE ELEMENTS	RAF
CROSS-CONNECT DS1	92.71%
CROSS-CONNECT DS3	92.77%
CABLE SUPPORT--VAR	92.64%
DC POWER	92.75%

PACIFIC

[THERE ARE NO RAFs FOR PACIFIC]

NEVADA

EI RATE ELEMENTS	RAF
CROSS-CONNECT DS3	93.95%

SOUTHWESTERN

EI RATE ELEMENTS	RAF
CONDUIT	46.77%
DC TRANSMISSION POWER - 100 AMPS	68.38%
DC TRANSMISSION POWER - 40 AMPS	94.68%
DS1 INTERCONNECTION CROSS-CONNECT	64.24%
DS3 INTERCONNECTION CROSS-CONNECT	41.06%

US WEST

EI RATE ELEMENTS	RAF
CROSS-CONNECT DS1	78.69%
CROSS-CONNECT DS3	78.78%
ENTRANCE STRUCTURE-PER FT, PER INNERDUCT	81.75%
MAINTENANCE - PHYSICAL SPACE	94.05%
HUMIDIFICATION - PHYSICAL SPACE	94.04%

CENTEL FLORIDA

EI RATE ELEMENTS	RAF
FLOOR SPACE PER SQ FT --ALL OFFICES	85.59%

CENTEL ILLINOIS

EI RATE ELEMENTS	RAF
TRANSMITTER/RECEIVER & FLOOR SPACE/SQ FT	
--DES PLAINES	83.86%

CENTEL NORTH CAROLINA

EI RATE ELEMENTS		RAF
FLOOR SPACE PER SQ FT	--ASHEBORO	88.24%
	--HICKORY MAIN	90.47%
	--SPRING ROAD	85.46%
	--MT AIRY	87.11%
	--NO. WILKESBORO	87.10%

CENTEL NEVADA

EI RATE ELEMENTS		RAF
FLOOR SPACE PER SQ FT	--NORTH 2	83.16%
	--NORTH 3	86.10%
	--NORTH 5	88.21%
	--WEST 8	87.20%
	--MAIN	84.57%

CENTEL VIRGINIA

EI RATE ELEMENTS		RAF
FLOOR SPACE PER SQ FT	--CHARLOTT. MAIN	87.54%
	--CHARLOTT. NO.	84.19%
	--FRONT ROYAL	86.42%
	--LEXINGTON	84.49%
	--MARTINSVILLE	87.66%
	--ROCKY MT	87.25%

CINCINNATI BELL

EI RATE ELEMENTS	RAF
CROSS-CONNECT DS1	85.66%
CROSS-CONNECT DS3	85.62%
PARTITIONED SPACE PER SQ FT	
GROUP I	90.79%
GROUP II	88.28%
GROUP III	88.27%
RISER CABLE SPACE	
GROUP I	85.60%
GROUP II	85.61%
GROUP III	85.61%
CONDUIT PER DUCT FOOT	73.11%
DC POWER	
GROUP I	86.83%
GROUP II	87.00%
GROUP III	87.05%

CONTEL ILLINOIS

EI RATE ELEMENTS		RAF
PARTITION SPACE	--FREEPORT	71.09%
	--OREGON	71.19%
CABLE SPACE	--FREEPORT	76.02%
	--OREGON	75.79%

CONTEL VIRGINIA

[THERE ARE NO RAFs FOR CONTEL VIRGINIA]

GTE CALIFORNIA

[THERE ARE NO RAFs FOR GTE CALIFORNIA]

GTE FLORIDA

EI RATE ELEMENTS		RAF
PARTITION SPACE	--AUBURNDALE	80.69%
	--CLEARWATER-MAIN	80.27%
	--GANDY	80.29%
	--PINELLAS	80.76%
	--SARASOTA-MAIN	80.60%
	--SWEETWATER	80.68%
	--TAMPA #5	80.40%
	--TAMPA-EAST	80.65%
	--TAMPA-MAIN	80.40%
	--UNIVERSITY (TAMPA)	80.92%
CABLE SPACE	--AUBURNDALE	83.64%
	--CLEARWATER-MAIN	83.90%
	--GANDY	83.01%
	--PINELLAS	84.42%
	--SARASOTA-MAIN	83.49%
	--SWEETWATER	82.87%
	--TAMPA #5	84.52%
	--TAMPA-EAST	83.54%
	--TAMPA-MAIN	84.04%
	--UNIVERSITY (TAMPA)	83.28%

GTE HAWAII

[THERE ARE NO RAFs FOR GTE HAWAII]

GTE IDAHO

EI RATE ELEMENTS		RAF
PARTITION SPACE	--COUER D'ALENE	85.93%
CABLE SPACE	--COUER D'ALENE	90.93%

GTE ILLINOIS

EI RATE ELEMENTS		RAF
PARTITION SPACE	--BLOOMINGTON-EAST	96.53%
	--CARBONDALE	96.39%
	--JACKSONVILLE	96.65%
	--LAWRENCEVILLE	96.62%
	--LINCOLN	96.83%
	--MACOMB	96.55%

GTE KENTUCKY

EI RATE ELEMENTS		RAF
PARTITION SPACE	--LEXINGTON-EAST	95.07%
	--LEXINGTON-SOUTH	95.21%
	--MOREHEAD	95.55%
CABLE SPACE	--LEXINGTON-EAST	99.44%
	--LEXINGTON-SOUTH	99.52%
	--MOREHEAD	99.78%

GTE MICHIGAN

EI RATE ELEMENTS		RAF
PARTITION SPACE	--MUSKEGON-MAIN	93.00%
CABLE SPACE	--MUSKEGON-MAIN	97.14%

GTE OREGON

EI RATE ELEMENTS		RAF
PARTITION SPACE	--ALOHA	95.52%
	--BEAVERTON	95.87%
	--GRESHAM	95.76%
	--HILLSBORO	95.63%
	--SOMERSET WEST	95.80%

GTE TEXAS

EI RATE ELEMENTS		RAF
PARTITION SPACE	--BRYAN-MAIN	98.18%
	--DENTON-MAIN	98.01%
	--DFW AIRPORT	98.47%
	--IRVING-EAST	98.39%
	--IRVING-MAIN	97.84%
	--IRVING-NORTH	98.26%
	--IRVING-WEST	97.91%
	--PLANO-MAIN	98.20%
	--PLANO-WEST	97.96%
	--SAN ANGELO-MAIN	98.17%
	--TEXARKANA	98.55%

GTE WASHINGTON

EI RATE ELEMENTS		RAF
BUILDING MODIFICATION-MODERATE	NRC	80.88%

LINCOLN

[THERE ARE NO RAFs FOR LINCOLN]

ROCHESTER

EI RATE ELEMENTS	RAF
CROSS-CONNECT DS1	98.48%
CROSS-CONNECT DS3	95.84%

SNET

[THERE ARE NO RAFs FOR SNET]

UNITED FLORIDA

EI RATE ELEMENTS	RAF
CONDUIT SPACE	97.05%
CROSS-CONNECT DS1 PHYSICAL OR VIRTUAL	98.90%
CROSS-CONNECT DS3 PHYSICAL OR VIRTUAL	97.32%
CONDUIT SPACE, FIXED --ALTAMONTE SPRINGS	81.88%
--APOPKA	81.89%
--AVON PARK	81.88%
--CYPRESS LAKE	81.90%
--FORT MYERS-LEE	81.89%
--GOLDENROD	81.89%
--KISSIMMEE	81.89%
--LAKE BRANTLEY	81.89%
--OCALA	81.90%
--SOUTH FORT MYERS-CLEVELAND	81.89%
--WEST KISSIMMEE	81.89%
--WINTER PARK	81.89%
ROOF SPACE --ALTAMONTE SPRINGS	81.92%
--APOPKA	81.83%
--AVON PARK	81.82%
--CYPRESS LAKE	81.78%
--FORT MYERS-LEE	81.97%
--GOLDENROD	81.64%
--KISSIMMEE	82.03%
--LAKE BRANTLEY	81.78%
--OCALA	81.94%
--SOUTH FORT MYERS-CLEVELAND	81.83%
--WEST KISSIMMEE	81.93%
--WINTER PARK	81.84%
XMTR/RCVR SPACE --ALTAMONTE SPRINGS	82.12%
--APOPKA	81.83%
--AVON PARK	81.82%
--CYPRESS LAKE	81.78%
--FORT MYERS-LEE	81.91%
--GOLDENROD	81.64%
--KISSIMMEE	82.03%
--LAKE BRANTLEY	81.78%
--OCALA	81.94%
--SOUTH FORT MYERS-CLEVELAND	81.83%
--WEST KISSIMMEE	81.93%
--WINTER PARK	81.84%
FLOOR SPACE --ALTAMONTE SPRINGS	82.12%
--APOPKA	81.83%
--AVON PARK	81.82%
--CYPRESS LAKE	81.78%
--FORT MYERS-LEE	81.91%
--GOLDENROD	81.64%
--KISSIMMEE	82.03%
--LAKE BRANTLEY	81.78%
--OCALA	81.94%
--SOUTH FORT MYERS-CLEVELAND	81.83%
--WEST KISSIMMEE	81.93%
--WINTER PARK	81.84%
DC POWER --ALTAMONTE SPRINGS	82.74%
--APOPKA	82.20%
--AVON PARK	82.44%
--CYPRESS LAKE	82.56%
--FORT MYERS-LEE	82.25%
--GOLDENROD	82.10%
--KISSIMMEE	81.43%
--LAKE BRANTLEY	81.71%
--OCALA	82.40%
--SOUTH FORT MYERS-CLEVELAND	82.15%
--WEST KISSIMMEE	81.96%
--WINTER PARK	82.04%

UNITED INDIANA

EI RATE ELEMENTS		RAF
CONDUIT SPACE, FIXED	--WARSAW	99.27%
ROOF SPACE	--WARSAW	99.19%
XMTR/RCVR SPACE	--WARSAW	99.27%
FLOOR SPACE	--WARSAW	99.27%
DC POWER	--WARSAW	99.73%

UNITED MIDWEST

EI RATE ELEMENTS		RAF
CONDUIT SPACE, FIXED	--FERRELVIEW	91.82%
	--JEFFERSON CITY	91.83%
	--ROLLA	91.83%
ROOF SPACE	--FERRELVIEW	91.73%
	--JEFFERSON CITY	91.83%
	--ROLLA	91.81%
XMTR/RCVR SPACE	--FERRELVIEW	91.77%
	--JEFFERSON CITY	91.83%
	--ROLLA	91.83%
FLOOR SPACE	--FERRELVIEW	91.77%
	--JEFFERSON CITY	91.83%
	--ROLLA	91.83%
DC POWER	--FERRELVIEW	92.94%
	--JEFFERSON CITY	92.66%
	--ROLLA	91.81%

UNITED NORTH CAROLINA

EI RATE ELEMENTS		RAF
CONDUIT SPACE		99.35%
CONDUIT SPACE, FIXED	--ELIZABETH CITY	75.85%
	--FAYETTEVILLE-MCGILVARY	75.82%
	--FAYETTEVILLE-MALLONEE	75.83%
	--FRANKLINTON	75.84%
	--GREENVILLE-FIFTH	75.82%
	--HAVELOCK	75.84%
	--HENDERSON	75.80%
	--JACKSONVILLE-BOULEVARD	75.82%
	--JACKSONVILLE-BRIDGE	75.82%
	--KINSTON	75.83%
	--NEW BERN	75.81%
	--ROCKY MOUNT-WASHINGTON	75.85%
	--SOUTHERN PINES	75.86%
	--WILSON	75.85%
ROOF SPACE	--ELIAZBETH CITY	76.15%
	--FAYETTEVILLE-MCGILVARY	76.45%
	--FAYETTEVILLE-MALLONEE	75.94%
	--FRANKLINTON	75.88%
	--GREENVILLE-FIFTH	76.06%
	--HAVELOCK	76.23%
	--HENDERSON	75.96%
	--JACKSONVILLE-BOULEVARD	75.37%
	--JACKSONVILLE-BRIDGE	75.79%
	--KINSTON	75.74%
	--NEW BERN	75.72%
	--ROCKY MOUNT-WASHINGTON	75.68%
	--SOUTHERN PINES	76.10%
	--WILSON	76.04%
XMTR/RCVR SPACE	--ELIZABETH CITY	75.43%
	--FAYETTEVILLE-MCGILVARY	75.72%
	--FAYETTEVILLE-MALLONEE	75.63%
	--FRANKLINTON	75.85%
	--GREENVILLE-FIFTH	75.71%
	--HAVELOCK	75.48%
	--HENDERSON	75.88%
	--JACKSONVILLE-BOULEVARD	75.90%
	--JACKSONVILLE-BRIDGE	75.91%
	--KINSTON	76.30%
	--NEW BERN	76.35%
	--ROCKY MOUNT-WASHINGTON	75.63%
	--SOUTHERN PINES	75.73%
	--WILSON	75.72%
FLOOR SPACE	--ELIAZBETH CITY	75.43%
	--FAYETTEVILLE-MCGILVARY	75.72%
	--FAYETTEVILLE-MALLONEE	75.63%
	--FRANKLINTON	75.85%
	--GREENVILLE-FIFTH	75.71%
	--HAVELOCK	75.48%
	--HENDERSON	75.88%
	--JACKSONVILLE-BOULEVARD	75.90%
	--JACKSONVILLE-BRIDGE	75.91%
	--KINSTON	76.30%
	--NEW BERN	76.35%
	--ROCKY MOUNT-WASHINGTON	75.63%
	--SOUTHERN PINES	75.73%
	--WILSON	75.72%
DC POWER	--ELIZABETH CITY	75.29%
	--FAYETTEVILLE-MCGILVARY	75.09%
	--FAYETTEVILLE-MALLONEE	75.57%
	--FRANKLINTON	75.82%
	--GREENVILLE-FIFTH	75.63%
	--HAVELOCK	75.72%
	--HENDERSON	75.45%
	--JACKSONVILLE-BOULEVARD	75.60%
	--JACKSONVILLE-BRIDGE	75.22%
	--KINSTON	75.55%
	--NEW BERN	75.29%
	--ROCKY MOUNT-WASHINGTON	76.23%
	--SOUTHERN PINES	75.63%
	--WILSON	76.06%

EI RATE ELEMENTS		RAF
CONDUIT SPACE, FIXED	--BELLEFONTAINE	94.17%
	--LEBANON	94.17%
	--LIMA-ELIZABETH	94.17%
	--MANSFIELD-MULBERRY	94.16%
	--MASON	94.17%
	--MOUNT VERNON	94.16%
	--SIDNEY	94.17%
	--WARREN-PARK	94.17%
	--WAYNESVILLE	94.16%
	--WOOSTER-LIBERTY	94.16%
ROOF SPACE	--BELLEFONTAINE	94.05%
	--LEBANON	94.17%
	--LIMA-ELIZABETH	94.20%
	--MANSFIELD-MULBERRY	94.15%
	--MASON	94.06%
	--MOUNT VERNON	94.16%
	--SIDNEY	94.04%
	--WARREN-PARK	94.28%
	--WAYNESVILLE	94.14%
	--WOOSTER-LIBERTY	94.16%
XMTR/RCVR SPACE	--BELLEFONTAINE	94.16%
	--LEBANON	94.23%
	--LIMA-ELIZABETH	94.22%
	--MANSFIELD-MULBERRY	94.20%
	--MASON	94.08%
	--MOUNT VERNON	94.24%
	--SIDNEY	94.21%
	--WARREN-PARK	94.15%
	--WAYNESVILLE	94.14%
	--WOOSTER-LIBERTY	94.16%
FLOOR SPACE	--BELLEFONTAINE	94.16%
	--LEBANON	94.23%
	--LIMA-ELIZABETH	94.22%
	--MANSFIELD-MULBERRY	94.20%
	--MASON	94.08%
	--MOUNT VERNON	94.24%
	--SIDNEY	94.21%
	--WARREN-PARK	94.15%
	--WAYNESVILLE	94.14%
	--WOOSTER-LIBERTY	94.16%
DC POWER	--BELLEFONTAINE	94.21%
	--LEBANON	94.22%
	--LIMA-ELIZABETH	94.12%
	--MANSFIELD-MULBERRY	93.14%
	--MASON	94.32%
	--MOUNT VERNON	94.06%
	--SIDNEY	93.80%
	--WARREN-PARK	94.71%
	--WAYNESVILLE	94.05%
	--WOOSTER-LIBERTY	94.19%

UNITED EASTERN GROUP

[THERE ARE NO RAFs FOR UNITED EASTERN GROUP]

UNITED SOUTHEAST GROUP

EI RATE ELEMENTS	RAF
CONDUIT SPACE, FIX --BRISTOL TN-SIXTH	83.82%
--JOHNSON CITY TN-ROAN	83.83%
--JOHNSON CITY TN-KINGSPORT	83.83%
--KINGSPORT TN-COMMERCE	83.84%
--MIDWAY TN	83.83%
--BRISTOL VA	83.82%
--WYTHEVILLE VA	83.83%
ROOF SPACE --BRISTOL TN-SIXTH	83.80%
--JOHNSON CITY TN-ROAN	83.81%
--JOHNSON CITY TN-KINGSPORT	83.81%
--KINGSPORT TN-COMMERCE	83.80%
--MIDWAY TN	83.80%
--BRISTOL VA	83.80%
--WYTHEVILLE VA	83.94%
XMTR/RCVR SPACE --BRISTOL TN-SIXTH	83.84%
--JOHNSON CITY TN-ROAN	83.93%
--JOHNSON CITY TN-KINGSPORT	83.79%
--KINGSPORT TN-COMMERCE	83.80%
--MIDWAY TN	83.86%
--BRISTOL VA	83.84%
--WYTHEVILLE VA	83.67%
FLOOR SPACE --BRISTOL TN-SIXTH	83.84%
--JOHNSON CITY TN-ROAN	83.93%
--JOHNSON CITY TN-KINGSPORT	83.79%
--KINGSPORT TN-COMMERCE	83.80%
--MIDWAY TN	83.86%
--BRISTOL VA	83.84%
--WYTHEVILLE VA	83.67%
DC POWER --BRISTOL TN-SIXTH	84.03%
--JOHNSON CITY TN-ROAN	82.97%
--JOHNSON CITY TN-KINGSPORT	84.76%
--KINGSPORT TN-COMMERCE	83.50%
--MIDWAY TN	83.67%
--BRISTOL VA	84.03%
--WYTHEVILLE VA	84.71%

*U.S. Government Printing Office: 1993 — 300-842/00006